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Renate Haller-Trost

1. Introduction

While there has been a recent increase in the number of articles and reports regarding the ownership of the Spratly Islands in the South China Sea, there exists on the very edge in the southwestern corner of this body of water a small rock whose territorial sovereignty is also disputed, namely by Malaysia and Singapore. In 1842, the treasurers of a subscription raised in Canton in memory of James Horsburgh[2], offered a contribution to the Straits Settlements Government for the construction of a lighthouse to facilitate the approach for vessels in the difficult waters in the eastern part of the Singapore Straits, as due to the rock's danger to shipping and the increasing traffic, numerous accidents had occurred[3]. Subsequently, a pharos was built in 1850, named Horsburgh Lighthouse, which went into operation on 15/10/1851.

2. Description of Pulau Batu Puteh

The rock is situated at the eastern entrance of the Straits of Singapore at 1°19.8'N, 104° 24.4'E.[4] The early Portuguese navigators called the feature *Pedra Branca*, (a name still used by Singapore today) meaning *White Rock*, while the Chinese referred to it as *Pai Chiao* (White Island). On present Malaysian maps it carries the name of *Pulau Batu Puteh* (White Rock Island)[5]. The reason for this consistent naming lies in the whiteness of the rock originating from the droppings of seabirds. According to a description abstracted from the Bengal Marine Proceedings[6], the feature consisted of several rocks, measuring at its greatest length at low water spring tide 137 meters in a northeast/southwest direction. On the northern side large boulders were found, while the southern part consisted of smaller ones. At low water level detached rocks were found at a distance of twenty to thirty meters from the main rock. The highest point was 8.2 meters above high water ordinary spring tide. Meanwhile, however, the configuration of Pulau Batu Puteh has been altered since Singapore has built, *inter alia*, a heliport and radar facilities thereon[7] (Figures 1-3).

In relation to the pharos, Crawfurd in *A Descriptive Dictionary of the Indian Islands and Adjacent Countries* of 1856 gives the following account:

> *"A light-house of dressed granite 75 feet in height has recently been erected on the summit of the rock, which is probably the most perfect of the kind that has ever been*

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1 throughout the text the Malay name is used

2 1760-1836, hydrographer of the English East India Company (HEIC)

3 Board's Collection F/4/2371 (1849-1850); for list of wrecks see Thomson JIA 1852 Vol.VI:386

4 this is in slight variance with information provided by Thomson who gives the coordinates at 1 20'15"N, 104 25'E; ibid:378. Thomson was the architect of the Horsburgh Lighthouse

5 the usage of *pulau*, i.e. *island*, in the Malay vesion has no bearing on the status of the feature; referring to the descriptions available, Pulau Batu Puteh is a 'rock' according to Art.121.3 UNCLOS III, generating only a territorial sea

6 P/172/60,1851

7 The Star 27/10/1991

constructed to the eastward of the Cape of Good Hope. The light which is regularly illuminated is on the revolving principle, attaining its greatest brilliancy once a minute as the concentrated rays strike the eye of the spectator. It is visible from the deck of a ship at the distance of 15 miles, when it disappears below the horizon, but it may be seen much further from the masthead, as its brilliancy is so great that the horizon is the only limit to its range. The reefs and dangers which beset the eastern entrance of the Straits of Malacca are all within the influence of the light as visible from a ship's deck."

3. Origin of Dispute

Proof to territorial title always entails a problem *inter alia*, due to the availability of documentation which often contains - for various reasons - a certain degree of incompleteness. The following assessment is based upon the position held until the end of 1991. On 17/2/1992, Singapore presented to Malaysia documents in order to prove the republic's ownership over Pedra Branca. Four months later (on 29/6/1992) Malaysia in turn handed to the Singapore Government a memorandum entitled *Malaysia's Sovereignty over Pulau Batu Puteh*. Neither document has yet been made accessible to researchers. Therefore the arguments examined in this paper are based on the situation as presented by either country before the exchange of notes. Most of the official documents accessible are found in London at the India Office Library and the Public Record Office, but only few show any direct reference to Horsburgh Lighthouse on Pulau Batu Puteh; none relate to the question of territorial sovereignty over the rock as such before the structure was erected.

The problem regarding ownership of the rock only emerged after Malaysia issued its *Map Showing the Territorial Waters and Continental Shelf Boundaries* (also referred to as *Peta Baru*) on 21/12/1979[8] in which Malaysia unilaterally included the rock in its territorial waters establishing turning point 30 at the intersection of the perpendicular bisectors of a triangle constructed by the three points of Pulau Batu Puteh, Tanjong Sading and Tanjong Berakit. There is no evidence that any dispute had arisen before 1979. In 1953, the State Secretary of the Johore Government[9] replied to a question from the Singapore Government (both being at that time still under British control) that Johore did not claim ownership of Pulau Batu Puteh[10].

The co-ordinates referring to the turning points (TP) shown on the Malaysian Map delimiting the territorial sea in the area in question are as follows:

TP27	1° 13'.65 N	104° 12'.67 E
TP28	1° 16'.02 N	104° 16'.15 E
TP29	1° 16'.05 N	104° 19'.08 E
TP30	1° 15'.55 N	104° 28'.45 E
TP31	1° 16'.95 N	104° 29'.33 E
TP32	1° 23'.09 N	104° 29'.05 E

8 hereafter referred to as the 'Malaysian Map'. In 1969, Malaysia had proclaimed the extension of its territorial waters from 3 nm to 12 nm; see Emergency (Essential Powers) Ordinance No.7 of 2/8/1969

9 Johor(e) is the most southern state of Peninsular Malaysia. Unless cited from original texts, the old spelling of Johore is used

10 as reported by Malaysian Prime Minister Mahathir at a Cabinet meeting on 9/8/1989

Waters northward of this line are considered by Malaysia to be under its national jurisdiction. Since Malaysia has not yet published its baselines as required by the Law of the Sea Conventions[11], it must be inferred that its baselines lie 12 nm parallel north to the above-mentioned co-ordinates (Figure 1).

In September 1991, the Mentri Besar of Johore stated that *"from the viewpoint of history, Pulau Batu Puteh belongs to us"* and that *"the Johor government was ready to provide evidence if necessary to prove that the island indeed belonged to Johor"*[12]. This view was repeated at a forum focusing on Pulau Batu Puteh held in Johor Baru[13] in October 1991 attended by Malaysian historians[14]. At the Fourth ASEAN Summit in January 1992, however, Prime Minister Mahathir announced that *"Malaysia would adhere strictly to legal principles and not history to resolve the dispute"* and *"that the existence of other outstanding claims made it important for Malaysia to stick to one principle - that being the legality, rather than the historical basis of the claim"*[15]. As the text of the June memorandum is not available, it is not quite clear how this statement is to be interpreted, since the evaluation of the historical background to a territorial dispute is a long established and valid source in international law to prove title to territory; in fact it often provides the most rightful justification of ownership. As shown below, this principle was applied in various judgements of the International Court of Justice (ICJ).

Should the new argument for Malaysian territorial sovereignty be based on the fact that Pulau Batu Puteh lies within its unilaterally declared maritime zones, it has to be remembered that the Law of the Sea - neither in the Geneva Convention of 1958 nor in UNCLOS III - does not give rise to a new mode of territorial acquisition. Uninhabited islands or rocks which have been under the proven continuous and peaceful authority of a certain state for a recognisable period of time cannot be legally claimed by another state on the grounds that this feature now lies in a maritime zone acknowledged by the Law of the Sea. UNCLOS III does not alter the legal principles regulating the modes of acquisition recognized as valid principles in international law. It is the territorial title that generates maritime zones, not vice versa.

4. The Claims

Malaysia argued that the Sultan of Johore had exercised sovereignty over the rock since 1513 when the Johore-Riau-Lingga Sultanate was founded by Sultan Mahmud[16], who fled from the Portuguese when Malacca was captured in 1511. According to the Malaysian view, based on the theory of state succession[17] Pulau Batu Puteh belongs to the Federation of Malaysia

11 for normal baselines see Art.3 of the Geneva Convention on the Territorial Sea and Contiguous Zone, and Art.5 of UNCLOS III; for straight baselines see Art.4.6 and 16 respectively. Malaysia became party to the former convention by accession on 21/12/1960; it signed - but not ratified - the latter on 10/12/1982

12 Sunday Times, Singapore 8/9/1991

13 i.e. the capital of Johore

14 The Star 27/10/1991

15 FEER 13/2/1992

16 there are different historic accounts of who was Sultan of Malacca at that time: some maintain it was Mahmud (e.g. Newbold 1839/1971 Vol.II:45), others claim it was his son Ahmad (*inter alia*, Sejarah Melayu chapter XXIII)

17 according to Art.2 of the *Vienna Convention of States in Respect of Treaties*, 1978 'succession of states' means in this context the replacement of one state by another in the responsibility for the international relations of territory. Treaty obligations are passed on in cases of treaties establishing boundaries (Art.11). Although this convention has not been signed by either Singapore or Malaysia, many of its provisions codify customary law on the subject. it is a well established practice that new states succeed to the borders of the predecessor state as such, or as the case may be, to certain parts of it according to earlier boundary treaties

because it was part of the Federation of Malaya into which in turn the Sultanate of Johore was amalgamated when it joined the newly formed independent state in 1957. Malaysia further maintains that the fact that Singapore had built and still operates the lighthouse thereon does not affect its own original title to the rock.

Singapore, on the other hand, maintains that it has full territorial sovereignty and jurisdiction over the rock due to the Anglo-Dutch Treaty[18], and because the HEIC[19] whose legal successor Singapore is - had built a lighthouse thereon and maintained it since 1851. No government authority (neither Johore nor Malaysia) had up to 1979 objected against this status, or had made any claim to the contrary. It therefore considers the rock being legally part of its territory.

5. Some Legal Principles regarding Territorial Disputes

5.1 Critical Date

In order to analyse the present claim from an international law perspective, it is essential to determine the status of Pulau Batu Puteh at certain key points. This leads to the established practice in international law that, in cases of territorial disputes, it is necessary to determine a so-called *critical date*, i.e. a definite point of time as at which the territorial sovereignty rights of either party concerned have to be analysed and proven. The practice of employing the judicial technique of a critical date has been applied in various cases by the International Courts. The first usage of the term can be found in the *Island of Palmas Case*[20]. Here, the sole arbitrator Max Huber determined that:

> *"[i]f a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title...superior to that which the other State might possibly bring forward against it...It must be shown that the territorial sovereignty...did exist at the moment which for the decision of the dispute must be considered as critical"*

In this case, he decided that the moment of conclusion and coming into force of the *Treaty of Paris* of 10/12/1898[21] by which Spain ceded the Philippines to the USA has to be seen as 'the critical moment' since any change of territorial sovereignty could be based on that document, and continued that:

> *"...the question arises whether sovereignty...existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty..."*[22]

Three years later, in the *Clipperton Island* Case of 1931[23] the PCIJ determined the critical date to be 1897 as it was then that Mexico demonstrated its claim for the first time.

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18 *Treaty between his Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies*, signed in London 17/3/1824, ratified 8/6/1824; BFSP Vol.11:194 and FO 93/46/17

19 'Honourable East India Company', i.e. the English East India Company

20 The Netherlands v The United States, 1928, RIAA Vol.2:838. Palmas (or: Miangas) is an island 48 nm southeast off the Philippines island of Mindanao

21 BFSP Vol.90:382

22 *Island of Palmas* Case op.cit:843

In the *Legal Status of Eastern Greenland* Case[24] the Court held in 1933 that the critical date in the dispute between Denmark and Norway must be seen at that moment when Norway occupied the territory in question, proclaiming its claim over it.

In the judgement of the *Minquiers and Ecrehos* Case[25] Fitzmaurice, who served as council for the United Kingdom, attempted to institutionalise the terminus into a legal theory in order to establish a time limit within which the parties' claim should be adjudged. The Court rejected France's view that the *Anglo-French Fishery* Convention of 1839 should be taken as the critical date since this agreement only dealt with fishing rights in certain waters and *"no dispute as to sovereignty over the Ecrehos and Minquiers groups had* [then] *arisen"*[26]. The Court also disallowed two further possible critical dates, both on the grounds that, although:

> *"the Parties have for a long time disagreed as to the sovereignty over the two groups, the dispute did not become 'crystallized' before the conclusion of the Special Agreement of December 29th, 1950 and that therefore this date should be considered as the critical date, with the result that all acts before that date must be taken into consideration by the Court."*[27]

In order to summarise the main issues regarding the aspects of the critical date, it is appropriate to quote Fitzmaurice - who among the scarce literature regarding the term and effect of the critical date in international law - has elaborated the issue the most. He states seven considerations which should be taken into account of which the six principal ones are as follows:

> *"(i) There is a critical date in territorial disputes as at which... the question of sovereignty falls to be determined.*
>
> *(ii) This date is prima facie the date at which the dispute on the issue of sovereignty 'crystallizes'.*
>
> *(iii) The date of crystallization is itself prime facie the date at which the party not in possession of the territory makes a formal claim to it - (but it may equally be the date on which the party having, or claiming to have, title challenges the action of the party seeking to acquire it).*
>
> *(iv) However, the conduct of the parties in relation to the claim is material to the question of what is the critical date. Therefore, it will not always follow that the critical date will be that which would otherwise result from principles (ii) and (iii).*
>
> *(v) Prima facie, the establishment of a critical date excludes consideration of all acts and events subsequent to it...*

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23 France v Mexico; AJIL 1932 Vol.26:390

24 Denmark v Norway; PCIJ Reports 1933, Series A/B, Fascicule No.53

25 France v UK; ICJ Reports 1953:47

26 ibid:59

27 ibid

> *(vi) In the 'special circumstances' of a given case, and more particularly where activity in regard to* [the territory] *had developed gradually long before the dispute as to sovereignty arose, and .... has since continued without interruption and in a similar manner there may be grounds for admitting considerations of post-critical date acts and events."*[28]

Following Fitzmaurice's deliberations of point (ii) above, it evinces that in the present case, the year when Malaysia included the rock within its territorial waters, therewith laid claim to title over the feature, should be considered as the critical date. In order to examine the legal position of Pulau Batu Puteh at that point of time, it is necessary to embark on a course of historical analysis leading to the time when the dispute crystallized. To arrive at a decision, certain criteria have to be examined:

(i) Since Malaysia contends that Pulau Batu Puteh belonged to Johore and not to the HEIC, the question of sovereignty of both entities has to be carefully analysed to show whether either entity was a verifiable international personality entitled to exercise territorial sovereignty, thus having the legal capacity to conclude valid treaties regarding the transfer of territory during the time in question.

(ii) The existence of any treaties and documents relating to Pulau Batu Puteh before 1979; and

(iii) The status of the contested territory at the time when the dispute arose.

5.2 Historical Consolidation

A few words have to be said about the principle of historical consolidation since it can be relied upon in cases where territorial title is not based on an unequivocal treaty of cession specifically referring to the territory in question. In the present case, the length of historical consolidation would comprise a period of one hundred and twenty-eight years, i.e. from the time the lighthouse was built (1851) to the time Malaysia claimed the rock (1979).
As Schwarzenberger suggests:

> *"Titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith. Initially, as, for instance, in the case of the transfer by way of cession of a territory from one State to another, the validity of a title to territory is likely to be relative. If, however, other states recognize such a bilateral treaty...or estop themselves in other ways from contesting the transfer, the operational scope of the treaty tends increasingly to become more absolute. The more absolute a title becomes, the more apparent becomes the multiplicity of its roots. In this movement from relative to absolute validity, it undergoes a process of historic consolidation"*[29]

[28] Fitzmaurice 1955/56:39

[29] Schwarzenberger quoted by Jennings 1963:27 fn.2, see also Schwarzenberger *Title to Territory* 1957:310

Although Jennings points out that this principle has not become a doctrinaire principle as such, it is an obvious one, closely related to that of prescription[30]. Thus Oppenheim says:

> *"Prescription in international law may therefore be defined as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order. The question of what time and in what circumstances such a condition of things arises, is not one of law, but of fact when...*[e.g.] *a State which originally held a* [territory] *male fide..., knowing well that this land had already been occupied by* [or had been under the sovereignty of] *another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevailing among States that the present condition of things is in conformity with international order."*[31]

6. The Question of Sovereignty

The definition of 'sovereignty' is a complex matter. It involves at the simple level criteria and explanation of 'international legal personality', 'state', and 'government'. Without going into the complicated debate of these issues[32], I follow Crawford's definition of 'sovereignty' as a term that is:

> *"...sometimes used instead of 'independence' as a basic criterion for statehood.* [But it also carried the] *meaning as an incident or consequence of statehood, namely the plenary competence that States prima facie possess. Since the two meanings are distinct, it seems preferable to restrict 'independence' to a prerequisite for statehood, and 'sovereignty' to the legal incident. The term 'sovereignty' is also... used in other senses, e.g. to indicate actual omnipotence with respect to internal and external affairs"*[33].

Although currently rejected as singular criterion of sovereignty[34], during the nineteenth century 'plenary competence' was often seen as an essential factor. It is generally accepted that applying European categories to the (in this case) Southeast Asian pre-twentieth-century phenomena is mostly misleading. This includes the concept of 'state', 'government', 'administration' and similar connotations, especially that of 'sovereignty'. Besides, both entities, the HEIC and the Sultanate of Johore, underwent changes in the eighteenth and nineteenth century, and it is most problematic to apply present-day notions of international law and international legal personalities of today to them. As O'Connell states:

> *"Until the middle of the 18th century, both types of change* [i.e. the change of state and the change of government] *were assimilated...With the abstraction of the concept*

30 Jennings op.cit:28

31 Oppenheim 1963:576-577

32 see, *inter alia* Crawford 1979 chapter 1

33 ibid 26-27,71

34 ibid:421

> *of sovereignty, however, a conceptual chasm was opened between the change of sovereignty and change of government; in one instance a problem of substitution in the process of rights and obligations was raised; in the other, continuity of these rights and obligations was presumed by virtue of continuity in the personality of the possessor"*[35]

Without touching on the wider implications, in the present context, the term 'sovereignty' refers to the recognized legal competence as understood at the time in question, to enter and sign treaties regarding the transfer of territory. The main issue here is, whether the entities concerned recognized each other as being legally entitled to do so, and whether the succeeding political entities did the same and adhered to these treaties.

The difficulty in explaining the legal status of the HEIC and the Johore Sultan lies in the fact that actions were connected to a wide network of politics. There are complicated historic events to be considered which had direct influence on actions taken. These range from the scenario in Europe (e.g. Spain, Portugal, The Netherlands, Great Britain) to the events occurring within the region itself (based on influence of the Chinese, Arab Muslims, Aceh, Siam, Malays, Bugis, Siak and so on). It is certainly beyond the scope of this paper to describe the detailed vicissitude of three hundred years of history[36]. Therefore, the following two sections can only outline the main aspects relating to the question of sovereignty of the HEIC and the Sultan of Johore.

6.1 The English East India Company (HEIC)

The powers and privileges of the HEIC, granted by Royal Charter, were dependent on successive acts of British Parliament before being finally transferred to the Crown. During that period the Company established itself as a territorial sovereign. The history of this legal development can be roughly divided into four parts[37].

6.1.1 1600 - 1669

The first Charter of the HEIC was granted on 31/12/1600 by Queen Elizabeth I, and provided mercantile privileges for the purpose of direct trade with India and other parts of Asia, Africa and America[38] and the establishment of factories[39] which were consequently near the coast. No power of territorial sovereignty was included. This first Charter was to last for fifteen years,

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35 O'Connell 1967: Vol.1:5-6

36 for details of certain periods see, *inter alia*, Newbold op.cit. Vol.I:266-398 and Vol.II:41-54 *British Settlements in the Straits of Malacca*; Winstedt JMBRAS Vol.X, Part I 1932:55-66 *The Bendaharas and Temenggongs*; ibid Part II:320-302 *A Malay History of Riau and Johore* (page numbers are given in reverse as the article is preceded by the Jawi text of the *Tuhfat al-Nafis*); ibid Part III:1-167 *A History of Johore* 1365-1895; Linehan 1936 JMBRAS Vol.XIV, Part II:1-257 *A History of Pahang*; Raja Ali Haji Ahmad 1860-1982 *Tuhfat al-Nafis*; Turnbull 1972 *The Straits Settlements* 1826-1867; Rubin 1974 *International Personality of the Malay Peninsula*

37 the following summary of the legal history of the HEIC is mainly taken from Ilbert 1907 *Government of India* and Hooker 1969 *The East India Company and the Crown*

38 Ilbert 1907:5; the geographical limits of the trading rights extended approximately from the Cape of Good Hope eastwards to the Straits of Magellan - except where Christian states already existed in that region. Ilbert points out (ibid:8) that, as these limits were identical with those of the VOC (established 1602, dissolved 1799), both founding charters could be regarded as the Protestant counterclaim to the division and monopoly claimed by Spain and Portugal based on the Papal Bull *Inter Caetera* issued by Pope Alexander VI in 1492, later modified by the *Treaty of Tordesillas*, 1494

39 a 'factory' (Malay:loji) was the English term for a trading-station and warehouse used in the East

with the probability of renewal for the same length of time. On the outset, the company was owned by a group of London merchants joined in a loose association. Each member traded on his own separate capital.

In 1612, this provision was changed to a so-called 'joint stock' policy, after James I had, in 1619, made the company a perpetual institution. It now had the power to make its own laws and ordinances for its members which in essence seemed not to have differed greatly from the provisions of making bye-laws exercised by municipal and other commercial companies. When these regulations proved insufficient, due to incidents on the long voyages (i.e. in cases of mutiny and murder), additional power of authority was added. However, the Charter granted by Charles II in 1661, brought major changes to these powers executed by the government and council of the HEIC, as it was now empowered to judge all persons belonging to the Company according to the laws of the British Kingdom, and to execute judgement accordingly. The Governor of the HEIC was given *"power and command over its fortresses, to continue or make war and peace with any people that are not Christian in any places of [its] trade"*[40], and, *inter alia*, to erect fortifications and govern them in a legal manner. This was in addition to the powers to raise revenues for the purpose of naval and military defence. These powers were extended by the Charter of 1667 when the rights to raise revenue were added. In the same year, the Company took possession of Bombay which became the first territorial entity to be governed by it.

6.1.2 1669 - 1765

With the Charter of 1669, a clear transition from a merchant company to a territorial sovereign became visible as the HEIC now held the power and authority of government and command. Three years later, the Company was given full powers to declare war and make peace with any non-Christian nation being part of Asia or America, and the power to raise forces, exercise martial law and to establish a Court of Admiralty. There was, however, a proviso reserving to the Crown the sovereign rights over all forts and places of habitation, and the power of making peace or war was dependent on when the Crown *"shall be pleased to impose royal authority thereon"*[41].

The Charters of 1686 and 1683 repeated and extended certain privileges of the Company's officers, and in 1687 James II delegated the powers of establishing by Charter a municipality in Madras. This Act was passed under both, the Company's and the Crown's seal, and gave the Mayor of Madras the power to levy taxes, and to try civil criminal cases.

Due to the political changes in 1688 in England, the emergence of different political interests and personal power shifts within the HEIC, the 'Old Company' was opposed by an association known as the 'New Company'. In 1698, an Act of Parliament was passed under which 'the New Company' (or 'General Society') became 'The English Company trading in the East Indies'. The constitution of this new entity was more or less identical with that of the 'Old Company' and included the exclusivity of trading in the East and the same sovereign powers. Takeover bids by the 'Old Company' and further internal squabbles (mainly over money) ended

[40] Ilbert ibid:17

[41] ibid:19

in 1708 with the fusion of the two entities under Lord Godolphin's Award[42]. The Company was now officially named 'The United Company of Merchants of England trading in the East' and existed under this name until 1833[43].

In a new Charter (1726), necessary to legalize the merger, the municipalities of Madras and Bombay were re-established and Calcutta was added. The powers of the officers resembled more or less those of the previous ones, while certain privileges were added. In 1758, as a result of military actions against the French and the Nabob of Bengal, the Company was granted the power to cede, restore or dispose of any fortress, district or territory acquired (i) by conquest from any of the Indian princes or government during the recent troubles between the Company and the Nabob, or (ii) possessions which should be acquired by conquest in time to come, subject to the proviso that the Company should not have the power to cede, restore, or dispose of any territory acquired from the subjects of any European power without the special licence and approbation of the Crown. This Charter was relied upon as one of the foundations for the British Government of India to prove its territorial sovereignty[44].

6.1.3 1765 - 1858

This period was marked by continuous Acts of Parliament regulating the government in the East Indian possessions. Due to the military and administrative success of Clive[45] a 'diwani'[46] for Bengal, Behar and Orissa was obtained by way of grant from Shah Alam[47], by which a system of dual government was established. While the criminal jurisdiction of the occupied provinces was left with the local rulers, the HEIC had *de facto* financial and political control over these provinces. These events raised again in Parliament the question as to the right of a trading company to acquire on its own account powers of territory sovereignty[48]. Six Acts were passed[49] of which the fourth was the first direct recognition by Parliament of the territorial acquisitions of the Company. By this Act the latter was now required to pay an annual sum in order to be allowed to retain its territorial possessions and revenues therefrom. The State, now controlling the level of dividends, began to exercise direct control over all East Indies territories, an influence which eventually triggered off the downfall and dissolution of the HEIC due to misplaced financial assumptions and policies. While the individual high ranking office-bearers of the Company made enormous profits, the Company itself neared bankruptcy[50].

Despite major setbacks in India[51] the Company's Directors in England declared massive dividends. In 1772, it transpired that the Company was operating on a deficit of over £1.2 million. A year later, Parliament introduced extensive alterations into the system of governing

42 29/9/1708; IOl:A/1/63

43 Ilbert op.cit:30

44 see e.g. *Damodar Gordhan v Deoram Kanji*, 1876 Ind.L.R. 1, Bom.367

45 1725-1774; Governor of East India 1764-1767

46 literally: authority derived from the ruler

47 Aitchison 1929 Vol.I:355

48 however, once again the underlying reason was of a monetary nature, as the shareholders in England expected greater dividends due to the rumoured riches of the newly occupied territories

49 7 Geo.III c.48, c.49, c.57; 8 Geo.III c.2; and 9 Geo.III c.24

50 for the financial situation see Ilbert ibid:39

51 due e.g. to the huge pensions paid to the local rulers, the escalating costs of the wars, the defeat of English forces in the Carnatic and the famine in the north of India in 1770

the Indian possessions and placed the Company under the direct control of a Governor-General appointed by the Crown. In 1784 the Court of Directors was subordinated to a minister of the Crown, viz. the Chancellor of the Exchequer. While previously each Presidency (i.e. Bombay, Madras and Bencoolen) was independent and only responsible to the Company's headquarters in England, the *Regulating Act* of 1773, placed them under the control of Bengal (Fort William). Any commencement of hostilities, or the conclusion of any treaty could now only be undertaken with the consent of the Bengal Presidency, unless urgency required immediate action[52]. This was in fact the first assertion of parliamentary control over the treaty relations of the Company. Furthermore, a Supreme Court was established, whose Chief Justice was to be appointed by the Crown. The court's jurisdiction was extended to all British subjects residing in the provinces of Bengal, Behar and Orissa with the exception of the Governor-General and the members of his Council for offences committed in these areas[53].

Due to the defectiveness of the Act, questions arose in regard to the status of Bengal. This Presidency had not been annexed as such, but was under the protection of the British, with Moghul authority still being formally recognized. Sovereignty, however, was not defined; similarly the division of supreme authority within the Company (administrative, military and judicial) was not unequivocally laid down. Some of these inadequacies were removed by the *Amending Act* of 1781, but the management of the Indian possessions continued to raise much debate in Parliament. While, in 1773, the HEIC had been placed directly under the control of the Governor-General appointed by the Crown, in 1784 (*Pitt's Act*) the Court of Directors in England was made directly subordinate to the newly established Board of Control[54], a body headed by the Chancellor of the Exchequer, assisted by the Secretary of State and four Privy Councillors. These were the officials who forthwith appointed and dismissed the officers of the Company, and directly controlled all operations relating to civil or military government and revenues of the territories possessions in the East Indies. Various other regulations were approved, partly confirming old ones, partly adding new ones. The Governor-General was not, without express authority of the Court of Directors, to declare war, commence hostilities or enter into any treaty. Many regulations were later repealed, mostly because they proved to be unworkable, yet many remained substantially in force even after 1858 when the Company came under the government of the India Office[55].

Subsequent legislation[56] dealt mainly with internal Company regulations, financial aspects, civil and military administration. The Charter of 1813[57] had a direct effect on the future of the Company. Due to the Napoleonic wars, European ports were closed to English ships, and British traders demanded admission to those of Asia. This, combined with the financial difficulties of the HEIC, resulted in legislation that threw open the trade to the East Indies to all competitors, but reserved the monopoly of the Chinese trade and the tea trade to the

52 see e.g. Raffles: he arrived in Singapore on 29/1/1819. On the very next day he concluded a preliminary treaty with the Temenggong in order to check the increasing influence of the Dutch immediately; for treaty text see Allen, Stockwell, Wright 1981 Vol.I:28. Although the Bengal Presidency had in general given him *plein pouvoir* to conclude treaties with the local rulers in the region, these texts were not sent to Calcutta for individual approval before signature. The acquisition of Singapore was not officially authorized until July 1820; Newbold op.cit. Vol.I:278. *Temenggong* was a Malay royal title approximately equivalent to a war-, naval-, and foreign minister. Unless citing original texts, the present spelling of *temenggong* is used.

53 the other British subjects were to be tried and punished by the Court of England; for details see Hooker 1969:10-18

54 official known as 'Commissioners of the Affairs of India'

55 *Act of the British Parliament "for the better Government of India"*; 21 & 22 Vict.c.106; BFSP Vol.49:742

56 Charter Acts between 1793 and 1813

57 55 Geo.III c.155

Company, as it was evident that the commercial profits were primarily derived therefrom. Although the HEIC tried to argue that its political authority was not separable from its commercial privileges, it was decided that *"the expedience of continuing those privileges would be extended, subject to the above modifications, for a further term of twenty years, without prejudice to the sovereignty of the Crown of the United Kingdom of Great Britain and Ireland"*[58], a sovereignty that - in Parliament's view - had clearly been reserved in the earlier Charter of 1698, although at that time the territorial possessions had been much smaller in areas and numbers[59]. From now on the Company had to keep separate accounts to distinguish clearly between the political and territorial departments on the one side and its commercial affairs on the other.

In 1824, the Crown demonstrated this claim of *de facto* sovereignty in the Anglo-Dutch Treaty with the Netherlands dividing the Malay region into a British and a Dutch sphere[60]. Singapore was transferred to the HEIC[61] in the same year. Two years later it was, together with Penang and Malacca, combined to form 'The Incorporated Settlements of Prince of Wales's Islands, Singapore and Malacca' as the fourth Presidency of India with its seat of government in Penang[62]. In 1830, this body was reduced to a Residency under the new name of 'Straits Settlements' subordinated - for financial reasons - to the Bengal Presidency, and in 1832 the government moved to Singapore.

In 1833, the renewal of the Company's charter was due. It was decided that territorial possessions were allowed to remain under its government for another twenty years, but were to be held *"in trust for His Majesty, his heirs and successor, for the service of the Government of India"*. Furthermore, the Company lost its monopoly on the China and tea trades. This forced the HEIC to close its commercial business, but it retained its administrative and political power, vested in the Governor-General of India and his Councillors. However, the right to legislate for India lay solely with Parliament. All Indian laws were to be laid before it for approval. With the *Charter Act* of 1833[63], the HEIC terminated its trading functions altogether. The Charter of 1853[64] did not fix a definite term for the continuance of the remaining powers, but simply repeated that all Indian territories should remain under the government of the Company in trust for the Crown, until Parliament directed otherwise[65]. Another regulation removed from the Court of Directors the patronage of ports in their service, and opened the covenanted civil service to general competition[66], as the territories occupied or annexed had grown further and administration became increasingly complex.

58 Ilbert op.cit:77

59 e.g. Benares was added in 1775, Orissa in 1803, territories in the northwest provinces between 1801-1803, Assam, Arakan and Tenasserim in 1824

60 see infra

61 5 Geo.IV c.108, 24.6.1824

62 Penang had been denominated a fourth Presidency in 1805

63 3 & 4 Will.IV c.85

64 16 & 17 Vict c.95

65 Ilbert op.cit:90

66 since the 1793 Act (33 Geo.III c.52) the HEIC had reserved to its members the principal offices in India

6.1.4 1858 - 1874

The Act of 1858 transferred the Government of India directly to the Crown and all its administrators were now appointed by it, acting through the Secretary of State to whom all powers, formerly exercised by the Board of Control or by the Courts of Directors, were transferred. He was assisted by a council of fifteen members of whom seven were elected by the erstwhile directors of the HEIC. The property of the Company, including its naval and military forces, were also officially transferred to the Crown and the Board of Control was formally abolished. The HEIC thus ceased to exist; *de iure* it was dissolved as from 1/1/1874 by an Act in 1873[67].

This summary of the history of the HEIC provides clear evidence that the Company was *in law* at all material times acting on behalf of the Crown, being a commercial entity endowed with delegated sovereign powers. This is further stressed in judicial decisions, of which but a few are given below[68]. For instance, in *Dhackjee Dadajee v East India Company*[69] it was held in the appeal of 1843 that the HEIC had lost the character of a trading company after the passing of the *Government of India Act* in 1833[70] and acted solely as a public trustee vested with the powers of government. This distinction between the dual function of the HEIC was again demonstrated a year later in *Ramchund Ursamul v Glass*[71] and in *A.G. v Richmond*[72]. In a decision in 1846 (*R. v Shaik Boodin*[73]) it was held that the Company's political and executive sovereignty was based on the feudal powers embedded in Charles II's Charter of 1661, and, combined with the legislative powers given in Hastings' Regulations of 1772[74], the whole civil and military powers of government had been in the Company's hands, although there was no formal declaration of the sovereignty of the Crown as such[75].

In relation to Singapore, it has to be noted that from the first agreement between Raffles and the Temenggong of Johore in 1819, the island was, until 1824, under the control of the Bencoolen authority, which in turn was - if not a separate presidency as provided by 42 Geo.III c.29 - at least a Lieutenant-Governorship under the powers given to Raffles in 1818, although it was subject to control of the Governor-General in Calcutta[76]. With the exchange of territories as stipulated in the Anglo-Dutch Treaty of 1824, Singapore became a dependency of the India Government and with the *Straits Settlements Act* of 1866[77] it was placed under the Colonial Office.

It is evident that, due to the regulations in the *East India Company Act* of 1772[78] which stated that the President and the Council of Madras, Bombay and Bencoolen were not to make war or conclude a treaty without orders of the Governor-General of the HEIC, Singapore was

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67 36 Vict. c.17

68 for details see Hooker 1969:5-10

69 4 Ind. D.587 and 313 (appeal)

70 see supra

71 4 Ind. D.329

72 4 Ind. D.516

73 4 Ind. D.397

74 *East India Charter Act* 1772, 13 Geo.III c.63

75 for details see Hooker 1969:ibid

76 Rubin op.cit:278 fn.1

77 29 & 30 Vict. c.115, s.1: *Act of British Parliament to Provide for the Government of the Straits Settlements* (10/8/1866 taking effect from 1/4/1867); BFSP Vol.70:314

78 13 Geo.III c.63, s.9

acquired by way of treaty (cession) and through this act, had legally become part of the HEIC's possession. On this account the Government of Singapore possessed the same sovereign powers as the governments of the other Indian possessions. There was no doubt that it was competent to enter into legally valid treaties regarding the transfer of territory.

6.2 Johore

Before the transformation from the intricate system of personal ruled realms to the institution of states within a defined territory, the idea of the ruler as personification of the holder of omnipotence was the main structure that held the different southeast Asian societies together. Although boundaries between different political entities were known, they were rather fluid. The power of a ruler did not lie as such in the land he ruled, but in the people therein. Personal identification was consequently not so much towards a specific territory, but based on an alliance with a certain ruler. Pulau Batu Puteh was a small, uninhabitable feature with no interest to any of the sultans or their respective subjects.

The confusion between the then territorial rights of a native ruler and the present territorial rights of the state *per se* often leads to misinterpretation. As Westlake[79] - although talking about Europe - points out, the feudal rulers' territory were their property and capable of passing by marriage, bequest, inheritance or as appendage of office position in accordance with the rule of property of the region. This is not to say that the feudal systems of Europe were identical to the forms of government found in Southeast Asia[80], but certain parallels can be drawn. There was no clear distinction between property of a ruler and territorial sovereignty. Only when the feudal system of tenure disappeared and a separate body of a state government replaced the ultimate authority of the sultan, thus establishing a state entity with administrative districts and determinable borders and thereby shifting the legal entity from the personality of the sultan to that of a state *per se*[81], the notion of territorial sovereignty emerged. It has to be remembered that the perception of a territorial sovereignty only arrived in these areas when European powers extended their state authority based on control over territories to the exclusion of other rival European powers.

One should not mistake the perception of 'sovereignty' of past centuries as being identical with the definition and application of 'territorial sovereignty' as understood in international law today. As in the present case, the term 'sovereignty' of the earlier periods referred in the international context more often to the mutual recognized competence to enter into alliances and to sign treaties relating to a certain area, and not to absolute and exclusive powers over a territory.

Beside the fact that the notion of sovereignty of the Malay rulers varied from the one exercised by the HEIC, additional differences can also be attributed to geographical reasons. The British had to send representatives to conclude treaties, while the native rulers were *in loci* and independent of any legal control by a higher authority[82]. Even most of the minor

79 Westlake 1894:131

80 for differences see e.g. Rubin op.cit:114ff.

81 see infra

82 the first known treaty of such nature was concluded in 1600 between the Dutch and the Ruler of Amboyna; the Ruler of Johore signed a similar treaty in 1606 with the VOC; Alexandrowicz 1967:43. The first agreement between the HEIC and a local ruler was concluded with the Sultan of Aceh in 1602; Rubin op.cit:39

rulers, - i.e. those under vassalage - concluded treaties effecting territorial changes in their own name within the intermediary of formal plenipotentiaries as they were the highest legal authority in the region concerned by the mere fact of being sultan[83].

Although these agreements often contained the clause that the native ruler was not permitted to :

> *"enter into alliance and maintain correspondence with any other foreign power or potentate whatsoever, without the knowledge and consent"*

of the European power, the treaties were not prejudicial to the sovereignty of the local ruler as such. During the duration of the treaty, these clauses restricted their dealings with other political entities as they surrendered to the contracting state a considerable measure of control over foreign relations[84]. However, the problem for the British lay in which of the putative contenders to the regalia had the authority to enter into agreements[85]. This fact gave rise to some circularity because those rulers who did sign agreements with foreign powers derived, through the recognition of having entered into such an agreement, a certain amount of acknowledged sovereignty in doing so. It had been an established practice that the rulers of the area often formed - what in retrospect appears - unlikely alliances in order to strengthen their status and resources[86]This proves Alexandrowicz's point, that initially mostly minor and subordinate rulers concluded treaties with the European companies and allowed them settlements[87]. He argues further that many of the weaker native rulers had been vassals to more powerful potentates in the region (e.g. China or Siam), and that the opportunity of shifting alliances which would grant them better protection in return for commercial concessions cannot be seen as contradictory to traditional notions in the contemporary regional power structure. The legality and validity of such treaties was, for instance, confirmed by the International Court of Justice in the *Right of Passage* Case[88]in 1960, when it was held that the Treaty of 1779 between Portugal and the Ruler of Maratha[89]must be accepted as sufficient for the existence of a binding treaty. Alexandrowicz's argument continues that the recognition attributed by the ICJ to the Maratha Ruler of being capable of concluding binding treaties with European powers, cannot possibly be denied to other Asian rulers which enjoyed the same status as legal entities within the family of nations[90]. To argue that the Sultan of Johore did not have the *de iure* power of signing valid treaties would negate the *de facto* recognition of the Sultan's powers. Both the Dutch and the British made arrangements with the rulers of Riau-Lingga and of Johore, recognising *de facto* and *de iure* not only the sovereign powers of the respective sultans, but also those of the Temenggong and the Raja Muda[91].

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83 Kedah, for instance, was under Siamese suzerainty when its sultan ceded Penang (1786) and Province Wellesley (1800) to the British without the consent of Rama I

84 see also infra the judgement by Kay L.J. in *Mighell v Sultan of Johore* (UK Court of Appeal (1894) 1 Q.149)

85 on the intriguing problems of succession in Johore, see *inter alia* Logan, JIA 1858 Vol.II:46-67

86 it has to be remembered that the European attitude was by no means consistent either; e.g. since 1635 the English and Portuguese were allies in India; however, the former did not come to the latter's aid when a Dutch-Johore alliance attacked Malacca in 1641; Rubin op.cit:49; treaty text in Newbold op.cit. Vol.II:452ff

87 Alexandrowicz op.cit:37

88 Portugal v India: ICJ Reports 1960:6

89 17/12/1779, the Viceroy of Goa signing on behalf of the Queen of Portugal

90 Alexandrowicz op.cit:163

91 this was necessary due to the Malay-Bugis political structure of the sultanates

Treaties concluded during the period of 1819 to 1914 confirming the existence of Johore's sovereignty are:

(i) Sir Stamford Raffles' *Agreement between the HEIC and the Temenggong of Johore*, 30/1/1819[92]

This treaty was concluded for the establishment of a British factory in Singapore with a *quid pro quo* for protection. Art. VI states the restriction placed on Johore to conclude any agreements with other foreign powers, i.e. mainly with the Dutch. The Temenggong is here addressed as the 'Ruler of Singapore' who signed in his own name and on behalf of Sultan Hussain; Raffles signed on behalf of the Governor-General of Bengal.

(ii) *Treaty of Friendship and Alliance between Sir Stamford Raffles and Sultan HussainMahummad Shah, Sultan of Johore and Dato Temenggong Sri Maharajah Abdul-Rahman,* 6/2/1819[93].

This document is the ratification of the 30/1/1819 treaty including additional stipulations. It is the first treaty concluded directly with the *Sultan* of Johore and the HEIC[94]

(iii) *Arrangements Made for the Government of Singapore between Farquhar and Raffles on one side and the Sultan and the Temenggong on the other*, 26/6/1819[95]

The purpose of this agreement was to clarify between the two parties certain points regarding the better guidance for governing the people of Singapore.

(iv) *Treaty of Friendship and Alliance between the HEIC, and the Sultan and the Temenggong of Johore,* 2/8/1824 (Crawfurd's Treaty)[96]

Art.II deals with the cession by Johore to the HEIC of Singapore Island together with the adjacent sea, straits and islets to the extent of ten geographical miles (i.e. 8.7 nm) from the coast of the main island of Singapore.

This article gave rise to uncertainty, as part of such delimitation overlapped with Dutch territory on the island of Batam. This fact was rectified in November 1861, when it was ruled that the right of the British Government over the waters within ten geographical miles of Singapore must be limited to a distance of 3nm from any coast either of the mainland or islands within a circle of ten miles of which Singapore is the centre[97].

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92 Maxwell and Gibson 1924:116

93 ibid:117

94 according to the copy of the treaty available, this document was only signed by Raffles and not by either Johore ruler. However, it must be assumed that the original was duly signed by all contracting parties, as no comment is made on this fact in later documents

95 ibid:120

96 BFSP Vol.23:1146, ratified by the Governor-General of Bengal on 19/11/1824; see Newbold op cit. Vol.I:490

97 see e.g. Cavenagh's Report in Maxwell and Gibson op. cit.:6
The 1973 *Agreement Stipulating the Territorial Sea Boundary Lines between Indonesia and Singapore in the Straits of Singapore* (signed 25/5/1973; ratified 3/12/1973 by Indonesia and 29/8/1974 by Singapore) was based on the 1861 boundaries. However, Point 2 of this agreement (1°07'49.3"N, 103°44'26.5"E), measured from the Singaporean Pulau Satumu and the Indonesian Pulau Takong Besar, actually lies south of the Indonesian archipelagic baselines proclaimed in 1957 and therefore within Indonesian territorial waters

Art.VII of Crawfurd's Treaty restricts the freedom of the Johore rulers in regard to external affairs. Art. X assures the mutual non-interference in internal matters. Art. XII provides admission of trade and traffic of the British nation into all ports and harbours of Johore and its dependencies.

(v) *Arrangement between the Sultan Ali Iskander Shah bin Sultan Hussain and the Temenggong Daing Ibrahim bin Abdul Rahman Sri Maharajah* (i.e. between the sons of the previous Sultan and Temenggong respectively), 10/2/1855[98]

The reasons for this treaty are not only complicated[99], but they also reflect the increasing interest and influence in Johore's affairs by the British, who did not recognize Ali as the Sultan after Hussain's death in 1835 (partly due to his youth), but sided with the Temenggong Ibrahim who controlled the main part of the gambier[100] and pepper trade. In 1855, a compromise was reached by which Ali became Sultan, but ceded:

> *"in full sovereignty and absolute property...the whole of the territory of Johore within the Malay Peninsula and its dependencies with the exception of the Kassang territory"*,

a territory between the river of Kassang (Kesang) and the river of Muar on the west coast of Johore to Ibrahim. This treaty further fragmented the Sultanate of Johore. The point to be made here is the relevance to the sovereignty of the Sultan of Johore. Again there is no doubt that he possessed such, despite losing the main part of his territory[101].

(vi) *First Boundary Treaty between Johore and Pahang* (signed by the Temenggong of Johore, Abu Bakar, and the Bendahara of Pahang, Korais, witnessed by Cavenagh, Governor of the Straits Settlements) 17/6/1862[102].

By 1855, the Temenggong of Johore had gained both *de facto* and *de iure* control over Johore, while the Bendahara of Pahang had acquired a similar authority in Pahang. Their status, however, met opposition from the other Malay rulers, as this shift of authority undermined the traditional principle of succession and power structure[103]. The outcome of this treaty, however, was not only that a new border was fixed between Johore and Pahang[104], but also - and this bears the greater importance - that the British, having refrained from direct intervention, began to show much greater direct involvement in the internal affairs of the Malay States to protect their commercial interests. This was even more evident in the subsequent:

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98 Maxwell and Gibson op.cit.:127

99 for details see Turnbull op.cit.:278ff

100 gambi(e)r is a shrub whose extract is used as a masticatory, wrapped up with betel nut

101 with the death of Sultan Ali in 1877, Kassang came under the rule of Ibrahim's son, Abu Bakar

102 Maxwell and Gibson op.cit.:209

103 a similar incident had occurred in 1699, when Sultan Mahmud of Johore was murdered (ending the direct line of the old Malacca Sultanate) and the Bendahara Abd al-Jalil was installed as Sultan (Rubin op.cit.:88). This power shift had later consequences when in 1718 Raja Kechil (Kecik) of Siak (allegedly a son of Mahmud) attacked Johore claiming his right to the throne. His claim was challenged by the Bugis leaders of Riau-Lingga, who put Abd al-Jalil's son back into power, keeping for themselves the important position of the Yang di-Pertuan Muda, who consequently brought Johore under Bugis control in 1760

104 along the Indow (Endau) River awarding Pulau Tioman, Aor, Pulo Tingy (Pulau Tinggi), Siribuat andother offshore islets lying south off the East Coast to Johore; these concessions were an award for Johore's support in the Pahang civil war

(vii) *Second Boundary Treaty between Johore and Pahang*, 1/9/1868[105]; viz. the *Award Made by the Governor of the Straits Settlements George Rod*, when Korais' brother, Wan Ahmad, rose to power and the boundary was readjusted.

(viii) *Arrangement as to the Temenggong's Property in the Island of Singapore*, 19/12/1862 and 15/8/1864[106]

These arrangements amended certain provisions of the 2/8/1824 Crawfurd Treaty regarding payments to be made to the Temenggong, and transferred certain lands (Tulloh Blangah/Teluk Belanga) to the Straits Government. In the 1862 Agreement, Abu Bakar signed as 'Tumunggung'[107] and is addressed as the 'Sovereign Ruler of Johore'.

What then was the effect of these treaties regarding Johore's sovereignty? Up to and including the Crawfurd Treaty of 1824 there seems to have been no diminution of the Sultan's sovereignty, as long as there was one ruler who could be identified as such. The Johore rulers (i.e. both the Sultan and the Temenggong) signed without any abnegation of their sovereignty, although they also still recognized the Sultan of Lingga as their suzerain[108]. However, as pointed out above, due to the increasing problems regarding succession within the Johore State, the first formal diminution of Johore's sovereignty came in 1885 with the Johore Treaty[109] between the then Maharajah of Johore (Abu Bakar) and H.M. Secretary of State for the Colonies (F.A.Stanley). Besides cooperation in joint defence against an external hostile attack (Art.I), overland trade and transit rights for Britain through the State of Johore (Art.II)[110], and the appointment of a British Agent[111] (Art.III), the British were given the right of free access to the 3nm territorial waters of Johore, or, in any waters less than six miles in width, to an imaginary line midway between the coasts of both countries (Art.V)[112]. The next article restricts the scope of Johore's foreign relations with third countries to a greater extent than before, as:

> *"the Maharajah of Johore...will not without knowledge and consent of H.M. Government negotiate any Treaty, or enter into any engagement with any foreign State... or make any grant or concession to other than British subjects or British companies...or enter into any political correspondence with any foreign state."*

105 Maxwell and Gibson op.cit.:211

106 ibid:129

107 since the Agreement of 30/1/1819, the Temenggong of Johore carried the title 'Sri Maharajah'

108 Turnbull op.cit.: 291

109 signed in London 11/12/1855; Allen, Stockwell, Wright op.cit.:72

110 necessary for the British interests in Pahang

111 modelled on the already existent Resident in Perak, Selangor and parts of Negri Sembilan

112 on 16/8/1878 the British Parliament had enacted the *Territorial Waters Jurisdiction Act* defining in Art.7 "*the territorial waters of H.M. dominions in reference to the sea* [as meaning] *such part of the sea adjacent to...the coast of some other part of H.M. dominions, as is deemed by international law to be within the territorial sovereignty of H.M...within one marine league* [i.e. one twentieth part of one degree, viz. 3nm] *of the coast measured from the low water mark*"; BFSP Vol.69:202. On the question referring to the definition of 'territorial rights' and on the history leading to this act, see the *Franconia* Case (R. v Keyn) O'Connell 1984 Vol.II:93ff
However, despite this enactment, the question of Singapore's territorial waters arose again in 1906 in connection with the opium trade; see correspondence between Anderson and Lucas in CO 273/319. It was debated, whether Art.V of the 1885 Johore Treaty was intended to supersede Art.2 of the 1824 Crawfurd Treaty, i.e. whether the Straits Settlements' jurisdiction was ten geographical or three nautical miles. Reference is also made to the ruling of November 1861 (see supra) in which the right of the Straits Settlements over the territorial waters was limited to 3nm from Singapore's coast including its offshore islands. Despite further reference to Aitchison, Weld's notes of 1885 and various other minutes, it seems unclear what was perceived as being the correct position. The matter was finally resolved with the *Straits Settlements and Johore Waters Act* of 1928; see infra

It was further agreed that:

> *"...such correspondence shall be concluded through H.M.Government, to whom His Highness* [the Ruler of Johore] *makes over the guidance and control of his foreign relations"*[113].

Art VIII provides the change of title from 'Maharajah' to 'Sultan', a provision necessary to confirm the status of the ex-Temenggong, whose succession to the throne was regarded as usurpation by his fellow native rulers[114].

This treaty is also the first example that the personal name of the ruler was no longer used as a contracting party, but that the agreement was with the *Sultan of Johore* per se; it also recognized the independence of the Sultanate referring specifically to the 'Independent State of Johore'.

This de-personalization and abstraction of the position of the Sultan[115] was repeated in the *Agreement between His Britannic Majesty's Government and the Sultan of the State and Territory of Johore* 1914[116], which repealed Art.III of the 1885 Treaty, being concerned that Ibrahim, who had successfully avoided the appointment of a British Agent, should free himself from the economic dependency on Singapore[117]. The new treaty established a General Adviser with greater functions and powers than the Agent provided for in the Treaty of 1885 [118].

The purpose of the 1914 Agreement was to bring Johore to the same (British) administrative level as the FMS. Together with this document a 'surat akuan'[119] was published, which limited some of the more serious consequences of British intervention for Johore, thus giving Johore a special status in comparison to the other FMS, implying a lesser dependency upon Britain[120].

The wider question of Johore's sovereignty in the later years depended on the Constitution of Johore[121] in which the Sultan was referred to as the *"Sovereign Ruler and Possessor of this State Johore and its Dependencies"*. This document was the first written constitution[122] of any Peninsular Malay State and has to be seen in connection not only with the internal problems of Johore, but also with the *Treaty of Federation* 1895 between the Government of the Straits Settlement and the rulers of Negri Sembilan, Pahang, Perak and Selangor, *"placing themselves and their States under the protection of the British Government"*[123].

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113 only the first stipulation had been included in the Crawfurd Treaty of 1824

114 although it is quite clear from all the agreements that the British first and foremost concluded those treaties for their own advantages, the same is true for some of the local rulers, in order to confirm their contested royal title and status

115 implying a certain stability in regard to the complex question of succession in earlier decades

116 12/5/1914, signed by Sultan Ibrahim and the Governor of the Colony of the Straits Settlements A.H. Young;CO 273/407

117 see e.g. the problems regarding the construction of a railway through the state of Johore, linking Singapore to the FMS; Maxwell and Gibson op.cit.:252

118 also Abu Bakar had, during his reign (1877-1895), successfully avoided this appointment due to the establishment of a Johore Advisory Board, whose role was to advise him on how to rule Johore. This council was in reality ineffective and much less of a threat to the Sultan's independence than an Agent would have been. It also enabled Abu Bakar to communicate directly with the Colonial office, instead of dealing with the Governor of the Straits Settlements. The Board was dissolved in 1907 because the Colonial office refused to recognize it

119 literally: acknowledgement

120 see Braddell 1931:25-26

121 14/4/1895; Allen, Stockwell, Wright op.cit.:77 (wrongly dated 14/9/1895)

122 drafted by Abu Bakar's legal adviser, Messrs. Rodyk & Davidson (Braddell op.cit.:23)

123 for the question of sovereignty in the FMS see Hooker 1988:376ff

The Johore Constitution illustrates both, an adoption of British methods of Government, and the use of these methods to prevent greater British influence in the internal affairs of Johore. Art.XV of the Johore Constitution states that:

> "[t]*he Sovereign may not in any manner surrender or make any agreement or plan to surrender the country or any part of the country and State of Johore to any European State or Power, or to any other State or nation, whether because he thinks it a trouble or a burden to him to be a ruler, or because he does not care to rule, or because he desires to obtain, take and accept any payment or pension from another nation or state; and this prohibition and restraint are likewise laid an d decreed on all and every one of the heirs and relatives of the Sovereign. And if this prohibition and restraint be resisted, or any attempt made to resist them, by the Sovereign himself, he shall be treated as guilty of betraying the trust reposed in him by God, in which case the people of the country shall be under no obligation to continue any longer their allegiance to him; and if by a relative of the Sovereign, he shall be considered to have committed high treason against the Sovereign and the State, and shall be liable to any punishment which it may be deemed proper to award."*

The text does not provide for recognition or ratification by the British authorities and, therefore, restricted Straits Settlements Government influence over the Sultan's action. The British realized (later[124]) that their system of rule-by-treaty was effectively undermined by unilateral actions of the Sultan, who was now, due to the implementation of the State Constitution, in fact not so much restricted in his action by a foreign power (i.e. the British), but by his own State Council. This certainly had a greater impact on the British, than on the Sultan's sovereignty. The British did not take much notice of this constitution, although in fact Art. XV was contrary to Art. VI of the 1885 Agreement.

Further proof regarding the sovereign status of the Johore ruler is to be found in *Mighell v Sultan of Johore*[125] where the court had to decide whether an English woman (Miss Mighell) could sue Mr. Albert Baker (Abu Bakar, the Sultan of Johore, travelling incognito in England) for not fulfilling a promise of marriage. Although the main question was in relation to the immunity of the Sultan and his submission to jurisdiction, it was expressed that, as the Queen's officers in form of the Colonial Office had stated in a letter to the Court that the defendant was an independent sovereign, it had to be taken as being so. *"All sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest"*[126]. In a later judgement, again the question of sovereignty of a Malay ruler was discussed. In the decision of the House of Lords in Duff *Duff Development Company v*

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124 see e.g. problems of implementing the Johore Treaty of 20/10/1945 (MacMichael Treaty) in which Sultan Ibrahim agreed that the UK should have full power and jurisdiction within the State and Territory of Johore (Art.1). There was an attempt by certain Johore Malays to dispose of him under Art.XV of the Johore Constitution; however, this attempt failed and Ibrahim retained his title

125 [1894] 1 Q.149

126 per Lord Esher M.R. (ibid:46); see also comments by Kay L.J.: *"...it was argued that the letter itself contains, by reference, a confutation of its statements; that it refers to a treaty, and, on looking to that treaty, it appears that its terms are, in effect, that the Sultan should have certain protection, he on his part engaging not to enter into treaties with any foreign Powers; and that such treaty amounts to an abnegation of his sovereign powers which destroyed his position as an independent sovereign. But, if he is not an independent sovereign, he must be a dependent one. I asked during the argument on whom he was dependent, and failed to get a satisfactory answer. The agreement by the Sultan not to enter into treaties with other Powers does not seem to be to be an abnegation of his right to enter into such treaties, but only a condition upon which the protection stipulated for is to be given. If the Sultan disregards it, the consequences may be the loss of that protection, or possibly other difficulties with this country; but I do not think that there is anything in the treaty which qualifies or disproves the statement in the letter that the Sultan of Johore is an independent sovereign..."*

Government of Kelantan and Anor the question of sovereignty was left to be decided by the Courts. Lord Finlay gave the essentials of sovereignty as follows:

> *"It is obvious that for sovereignty there must be a certain amount of independency, but it is not in the least necessary that for sovereignty there should be complete independence...But it would be idle to contend that sovereignty is destroyed by the fact that a protecting power has charge of foreign relations..."* [127]

These examples are taken from the later period of the Straits Settlements' relations with the local rulers, but it is possible to see, in general, the relevant status of the parties involved. It can be deduced from the above, that Johore was able to retain its unquestionable independence up to the 1885 Treaty, i.e. during the period directly relevant to the question of sovereignty of Pulau Batu Puteh. Although in some cases (see e.g. 1855 Treaty) readjustments were undertaken, successive rulers regarded these nineteenth century treaties as valid legal instruments.

In conclusion, it can be held that, based on historical records, there seems to have been no doubt in the minds of the then contracting parties that each possessed a recognisable sovereignty and the power to enter into treaties. The British authorities did not negate the sovereignty of the Johore rulers, neither did any dispute as to the validity of the various treaties arise.

7. Documents Relating to Pulau Batu Puteh

Having established that both relevant parties possessed sovereignty and therefore the legal faculty to hold territorial title and the power to enter into international valid agreement, it is now necessary to assess territorial affiliation of Pulau Batu Puteh during the previous century and to establish whether ownership over the rock can be deduced from relevant contemporary documents.

There can be no doubt in regard to the close dynastic connections between Johore and Riau-Lingga[128], nor that it was *once* one sultanate. But to base ownership of certain territories on the fact that Tiau-Lingga and Johore had at one point of time been one political entity is insufficient in international law[129]. After analysing the complex history of the Sultanate in relation with its allies and rivals at the end of the eighteenth and the beginning of the nineteenth century, it transpires that the dividing line between the Riau-Lingga Sultanate and the - now separate - Johore Sultanate originated from the time between 1814 and 1824 mainly for the following reasons: firstly, with the Convention of London, 1814[130] the British handed back to the Dutch certain overseas possessions the latter had held before 1803. This

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127 1924 A.C.797 (H.L.) at 814; this, by the way, was in contrast to the earlier held opinion that sovereignty was indivisible

128 e.g. at the beginning of the nineteenth century, the Yang di-Pertuan Muda of Riau-Lingga, Jafar - also referred to as the Raja Muda - was an uncle once removed of Sultan Hussain of Johore (Tengku Lung); the Temenggong of Johore, Abdul Rahman, was a nephew twice removed of the Yang di-Pertuan Muda and a son-in-law of Jafar's sister; folio 339:11 in Raja Al Haji ibn Ahmad's *Tuhfat al-Nafis*; henceforth cited as *Tuhfat*

129 it is for the same reason that e.g. the Natuna Islands (Kepulaunan Natuna, between the peninsula and Sarawak) do not belong to Malaysia, although they had been part of the Riau Empire; a claim by the Sultan of Johore in 1886 to include the Natuna Islands into the Sultanate because of their association with the Johore-Riau Empire was rejected by the British on grounds that the group was in 1866 unequivocally under Dutch control: CO 273/142, CO 273/150

130 *Convention between Great Britain and The Netherlands Relative to the Dutch Colonies*, 13/8/1814; BFSP Vol.2:370

agreement inspired the later division into a Dutch and British sphere confirmed in the above-mentioned Anglo-Dutch Treaty of 1824, which specified the rather vague stipulations of the earlier treaty. Secondly, on 19/8/1818, Jafar, the Yang di-Pertuan Muda of Riau-Lingga concluded with Farquhar (HEIC) a treaty confirming exclusive trade and monopolies for the British[131]. But three months later, on 26/11/1818. the Raja Muda concluded a very similar treaty with the Dutch[132]. From the European viewpoint, this policy necessitated action by their respective governments in order to avoid conflict between them; hence the Anglo-Dutch Treaty of 1824.

The treaty of 26/11/1818 between the Dutch and the Yang di-Pertuan Muda put Riau-Lingga effectively under Dutch control[133]. Raffles, looking for an alternative entrepot to Penang, hastily choose Singapore after having been informed of the Dutch involvement in Riau[134]. For the British, the issue at hand was to find a recognisable sovereign with whom they could conclude a binding treaty giving them the legal right to 'favourable terms'. They did not hesitate to take advantage of the inter-dynastic squabbles of local rulers as long as a contender was willing to oblige to sign these preferential terms by treaty. In general, most of the treaties concluded between the British representatives in the East and the native rulers were drafted by the former's legal officers. In this way the British held the initiative in forming treaty stipulations. To rule by way of treaty-making may be viewed as having been used as an instrument of gaining advantages for the British, being better acquainted with the systematic knowledge and the legal consequences of the law[135]. These earlier agreements were specifically concluded for the legal purpose of excluding other Europeans from obtaining trade concessions. This referred mostly to the Dutch who had the same understanding of treaty compliance as the British. Raffles installed Tengku Lung as *"Sultan Husain Syah, son of the late Sultan Mahmud Shah in the State of Singapore and all its subject territories"*[136], and concluded three treaties with: (i) the Temenggong on 30/1/1819; (ii) Hussain and the Temenggong on 6/2/1819; and (iii) with both again on 26/6/1819[137].

It has to be remembered that the legal concept of a treaty was perceived differently by the local Islamic rulers than by the Europeans. This is best described by Coulson:

> *"In English law the sanctity of contract means that the promise endures despite the normal vicissitudes of fortune. It is right that the promise should be kept 'for better or worse', 'through thick and thin', because this is in line with the popular belief that tenacity of purpose to some degree controls events and that the human will determines the future. The promise must dominate the circumstances.*
>
> *For Islam precisely the converse is true. Circumstances dominate the promise. Future circumstances are neither predictable nor controllable, but lie entirely in the*

131 *Tuhfat* folio 308:11ff and Netacher 1854:231-233; this document is signed by the Raja Muda

132 *Tuhfat* folio 311:1ff

133 *Tuhfat* folio 313:1ff. This was a renewal of the earlier treaty of 2/11/1784 between the VOC (Dutch East India Company) and Sultan Mahmud (1757-1811) according to which Dutch control over Riau was already established; for text of document see Netscher op.cit.:212-217

134 nothing came of the treaty Farquhar concluded on 31/8/1818 (BFSP Vol.28:1149) with Siak, nor of his suggestion of establishing a settlement on Kerimun Island (Pulau Karimun)

135 on the question of equal and unequal treaties see Alexandrowicz op.cit.:chapter VIII, especially 153-156

136 *Tuhfat* folio 316. While the Dutch and the Bugis supported the Yang di-Pertuan Muda, the English and Malays sided with Hussain, who had been ousted from his Riau throne by his younger brother Abdul Rahman while being away in Pahang

137 for treaty details see supra 6.2

> *hands of the Almighty. In the face of the predetermined march of events human activity assumes a relative insignificance and the contractual promise becomes a relatively ephemeral thing. If the tide of affairs turns, then the promise naturally floats out with it."*[138]

Relating this notion to the native rulers in the Malay region, they concluded treaties according to the change of the political situation and therefore sought agreements with whoever gave them the more effective protection against their enemies[139]. The Europeans, on the other hand, supported those rulers who were willing to enter into treaties stipulating favourable commercial terms. The theoretical issue of 'sovereignty' or legal consequences of non-compliance by the native rulers to treaties was of no great legal concern. The English recognized as Sultan whoever had ostensible authority and was willing to sign, while the Malay regarded treaties no longer binding when its immediate purpose had either been achieved or failed[140].

Also, as treaties were concluded with a sultan as an individual and not with state as such[141], a successor might not have necessarily felt bound by the treaty obligations his predecessor (often his rival) had concluded previously. 'Perpetuity' often ceased when political circumstances changed. At the beginning of the rule-by-treaty period between European and native rulers, no major retaliation for non-compliance seems to have occurred; there were mostly no provisions in case of default. The remedy was to sign a new treaty with a new ruler with different stipulations reflecting the changed scenario.

In March 1824, the Dutch and English signed the Anglo-Dutch Treaty which finally separated Johore from Riau-Lingga. Hussain, as well as Jafar, were fully aware of this[142], neither protested. The HEIC paid compensation to the Sultan and the Temenggong of Johore (see Crawfurd Treaty of August 1824), while the Dutch increased the revenues of the Yang di-Pertuan Muda of Riau-Lingga. Although the latter adhered to the boundaries laid down in Art. XII of the Anglo-Dutch Treaty, Sultan Hussain did not immediately oblige, still regarding Karimun Island as his own territory. This dispute was settled in the Crawfurd Treaty determining the southern delineation of Singapore (Art.II).

Taking account of the agreements mentioned under 6.2., the available evidence shows no issue of sovereignty in regard to the rock between the Straits Settlements Government or the Indian Authorities on one side, and Johore on the other. This is not surprising, as this feature is a singular, small, uninhabited rock, whose existence was of no interest or consequence to any ruler or government. As pointed out earlier, the only significance it had, was to the mariners. The rock is not part of the Rumenia Islands, a cluster of small islets 6 nm to the northwest, nor does it belong to the Rumenia Shoals (Beting Ramunia) at the same distance further north. This is not only a geographical fact, but was also perceived as being so by the Resident

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138 Coulson 1984:81-82

139 see for instance the Johore-Dutch alliance against Aceh 1606

140 this practice seems to be, for instance, in variance with the (now customary) provisions of Art. 62 in the *Vienna Conventions* on *Law of Treaties*, 1968. The question, however, lies in the interpretation of 'fundamental change' and 'essential basis'. Although even today the precise application of the *clausula rebus sic stantibus* according to the said article is vague (see Rohis 1989 especially chapter 4 and 5), the perception of the then still uncodified principle had been in existence for a long time and applied mostly according to political necessities

141 for later changes see supra 6.2

142 *Tuhfat* folio 339:11; folio 340 starts "[N]*ow when there were two kings in one kingdom, with the boundaries determined by two governments, the Dutch and the English..."*

Councillor of Singapore who commented in 1850 on the suggestion of having a station built on the Rumenia Group:

> *"I doubt whether such is absolutely necessary. Rumenia moreover belongs to the Sovereign of Johore, where the British possess no legal jurisdiction"* [143]

This clearly indicates that, while the Rumenia Islands (3 nm off the Johore coast) belonged to the Sultanate, Pulau Batu Puteh was outside its dominion. It was not included in the delimitation mentioned in Art. II of the 1824 Crawfurd Treaty, as that agreement was limited to ten *geographical* miles, measured from the main island of Singapore. It follows therefore that it cannot have been included in the *Straits Settlements and Johore Territorial Waters Act 1928*[144], as the latter refers only to *retroceding "certain...seas, straits and islets"* mentioned in the 1824 Crawfurd Treaty. It has to be inferred then, that according to Art.XII of the 1824 Anglo-Dutch Treaty, concluded five months earlier delimiting territory and commerce in the East Indies between the Netherlands and Great Britain, the dividing line between the Dutch and British possessions was drawn on the southern side of the Straits of Singapore, as the text states:

> *"...no British establishment shall be made on the Carimon Isles* [Pulau Karimun Besar], *or on the Islands of Barram* [Pulau Batam], *Bintang* [Pulau Bintan], *Lingin* [Lingga[145]] *or on any of the other Islands South of the Straits of Singapore, nor any Treaty concluded by the British Authorities with the Chiefs of these Islands."*

Pulau Batu Puteh clearly lies north of this line, i.e. 7½ nm north of Tanjong Sading (on Pulau Bintan, Indonesia), and therefore must be considered to have been situated on the 'British side' if anybody would have been concerned about its territorial affiliation at the time of the treaty conclusion. This fact also disproves the theory that the rock had been *terra nullius* at the time when the Government of the Straits Settlements decided to build a lighthouse on it twenty-six years after the treaty. The Straits Settlements henceforth exercised direct authority in a continuous manner over the rock until Malaysia claimed it in 1979; one hundred and twenty-eight years of a peaceable and uninterrupted exercise of *de facto* territorial sovereignty is undoubtedly a sufficient time to prove state presence during which title became firmly consolidated by long usage in conformity with international customary law, although there is no recognized principle of international law fixing in terms of years the period of time necessary to prove such control[146] Max Huber, in the afore-mentioned *Palmas* Case, adjudged the said island to the Dutch emphasising on the fact that long continuous exercise of effective control had conferred title in international law despite the fact that Palmas had been ceded by treaty to the United States of America. His argument was that the inchoate title of the Netherlands could not have been modified by a treaty concluded between third powers in a case where the establishment of Dutch authority, attested also by external signs of sovereignty, had led to such a degree of development:

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143 his letter No. 128/1850.1.11.

144 BFSP Vol.128:94; this agreement was signed on 19/10/1927

145 see Crawfurd 1856:218 *A Descriptive Dictionary of the Indian Islands and Adjacent Countries* 'Lingin - in Malay correct Lingga'

146 Permanent Court of Arbitration, RIAA Vol.2:820; See also *Clipperton Island Arbitration* 1931, AJIL 1932:390; here the Court decided that an actual manifestation of sovereignty on the territory may serve to create a stronger title than a historic claim of right, unsupported by such a concrete act

> *"that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position"*[147].

As pointed out above, there exists little historic information regarding the ownership of the rock *after* construction of the building was started. The only reference is found in the *Bengal Marine Proceedings: Marine Department*, Range 172 Vol.60, nos.9-12 (1851), which all imply ownership by the HEIC[148]. However, as mentioned earlier, the most informative record is to be found in the report given by Thomson in his *Account of the Horsburgh Lighthouse* written in 1852. This is a detailed representation of the proceedings leading to the construction of the pharos, the progress of the building, and the technical cum monetary particulars thereof. It does not show any evidence that the Johore rulers, who would have been - as shown above - the only legally relevant government to do so - approached the Straits Authorities requesting the surrender of the territory to the Sultanate, although it was a source of income as mariners had to pay considerable levies to cover the cost of the lighthouse. In no case was any question raised in regard to the HEIC's competence or jurisdiction. The discussions concerning the amount of levy to be paid by vessels entering the harbour led to the passing of *Indian Act VI* of 1852. The act itself reads:

> *"...the lighthouse and the appurtenances thereunto belonging or occupied for the purpose thereof...shall become the property of and absolutely rest in, the East Indian Company and their successors."*[149]

None of the Johore sultans protested against this status, nor is there any other evidence of a Johore claim during the period leading to 1979.

8. Territorial Status in 1979

The compendium given in 6.2 above shows the legal development of Singapore which, as summarized, shows that the present state is the legal successor to the area of the initial cession effected by the *Agreement between the HEIC and the Temenggong of Johore* of 1819, namely; from 1819 to 1824 Singapore was under the control of the Bencoolen Government; in 1824 it became, until 1858, a dependency of the India Government under the HEIC being - since 1826 - part of what was later known as the Straits Settlements; in 1858 (according to Art.1 of the above-mentioned *Act of the British Parliament "for the better Government of India"*), the HEIC possession ceased to be vested in the said Company and became part of the Crown; in 1866, according to the recitals of the *Straits Settlements Act*, Singapore - as a component of the Straits Settlements - ceased to be part of India and was placed under the British Government as part of the Colonial Possessions of the Crown[150]; in 1963 it joined the Federation of Malaysia[151] and separated two years later to become an independent state[152].

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147 *Palmas* Case op.cit.:870

148 the present author is aware of the one-sided source regarding documentation; however, as long as there is no other written proof forthcoming, conclusions have to be drawn based on existing materials

149 this act was later replaced by Act No.XIII of 1854 which extended the Company's jurisdiction to other lights in the Straits and altered the rate of levy. The HEIC also continued to assume complete ownership

150 on 27/3/1946 this act was repealed by which the Cocos (or Keeling) islands and Christmas Island were incorporated into the Colony of Singapore, see Art. 3 of *Order in Council Providing for the Government and Administration of Singapore as a Separate Colony*; BFSP Vol.146:86; see also 9 & 10 Geo.VI, c.37 and *Order in Council Repealing The Straits Settlements Act*, 1866 of same date; BFSP Vol.146:112. The Cocos Islands and Christmas Island were separated again from Singapore in 1955 and

On the other hand, Malaysia emerged as the legal successor to the Federation of Malaya. The latter entity comprised two groups of territories: the former Straits Settlements of Malacca and Penang[153], and the Federated and Unfederated Malay States.

Art.169 of the Constitution of the Federation of Malaya provided that any treaty, agreement or convention between Her Majesty, or her predecessors, or the Government of the United Kingdom on behalf of the Federation or any part thereof and any other country entered into before independence, shall be a valid treaty, following the principle of treaty obligations regarding state succession. The definition of the 'Malay States' was given in the *Federation of Malaya Agreement* of January 1948[154] as *"the States of Johore, Pahang, Negri Sembilan, Selangor, Perak, Kelantan, Kedah, Perlis, Trengganu and all dependencies, islands and places which, on the first day of December, 1941, were administered as part thereof, and the territorial waters adjacent thereto"*. Pulau Batu Puteh was not administered by Johore on 1/12/1941, neither was it a dependency thereof.

As the Federation of Malaysia accepted in 1963 (when it incorporated Singapore, Sabah and Sarawak) obligations to honour all pre-independence treaties (Art. 169 was transferred unaltered into the Constitution of Malaysia), it is bound by those governing territorial boundaries. When Singapore was separated in 1965, it was enacted that territory which before 1963 had been that of Singapore, and had therefore become part of Malaysia, should now devolve again to the State of Singapore[155]. Another criterion to examine ownership over the rock at the point of time when the dispute crystallized, is to look at Malaysia's state practice leading up to 1979 of which one example shall be given here:

In the 1969 *Treaty Relating to the Delimitation of the Continental Shelf between Malaysia and Indonesia*[156], Pulau Batu Puteh's position seems not to have been taken into effect. Point 11 of this agreement corresponds to the above-mentioned TP 32 of the Malaysian Map and was established on principles of equidistance between Malaysia and Indonesian territory. It coordinates lie 6½ nm northeast of the Pulau Batu Puteh at a distance of 11 nm from Batuan Puncak (part of the Malaysian Rumenia Island group), and at the same distance from the Indonesian Tanjung Berakit (the Indonesian baseline coordinates No. 195 at 1°13'.8 N, 104°35'.6 E). The fact that Malaysia did not use Pulau Batu Puteh as a baseline point or terminal when it concluded this treaty provides evidence that it did not consider the feature being part of Malaysian territory in 1969[157].

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transferred to Australia; see *Cocos (Keeling Islands (Request and Consent) Act* in 1954 and *Cocos (Keeling) Islands Act*, 1955 (3 & 4 Eliz.2, c.5). Christmas Island was constituted as a separate island before the transfer; for details on the latter point see O'Connell 1966:297ff

151 Art. 1 of the *Agreement Concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore* 9/7/1963, Cmnd. 2094

152 Art. II of the *Agreement Relating to the Separation from Malaysia as an Independent and Sovereign State* 9/8/1965, State of Singapore Government Gazette Extraordinary, Vol.VII, No.66; this agreement is also known as the *Independence of Singapore Agreement*

153 Malacca was ceded to the British by the Anglo-Dutch Treaty of 17.3.1824; the HEIC obtained possession of Penang by agreement in 1786 with the Sultan of Kedah and Captain Light

154 signed 21/1/1948 by Gent for Great Britain and the nine Malay rulers

155 Art. 13 of the Independence of Singapore Agreement specifically refers to Art. 169 of the Constitution of Malaysia

156 signed 27/10/1969

157 also, although no reference to ownership was made in the *IMCO Assembly Resolution on Navigation through the Straits of Malacca and Singapore* (Resn.A.375(X), Annex V, Section V) of 14.11.1977 by which a new navigation scheme at the Horsburgh Light Area was agreed upon, Malaysia did not make any declaration regarding its sovereignty over Pulau Batu Puteh at that point of time. Neither did it in the preceding *Joint Statement on the Malacca and Singapore Straits* signed by Indonesia, Malaysia and Singpore of 16/11/1971

9. Conclusion

On the basis of the evidence adduced, the following conclusion can be made:

(i) Both the HEIC and the Sultan of Johore possessed sovereignty to conclude valid treaties in regard to territorial transfers.

(ii) Due to the Anglo-Dutch Treaty of 1824, it can be inferred that Pulau Batu Puteh fell on the 'British side', although no exact coordinates were given.

(iii) The subsequent Crawfurd Treaty of 1824 between the HEIC on one side and the Sultan and the Temenggong of Johore on the other did not include the territory in question, as the cession was restricted to ten geographical miles from the mainland of Singapore, i.e. 8.7 nm. Pulau Batu Puteh lies at a distance of 24.4 nm therefrom.

(iv) No treaty of the nineteenth and/or twentieth century between the interested parties concerns itself with the rock. Evaluating the numerous records of that time, one can be certain that any such occurrence would have been subject to an official debate, mentioned in the relevant correspondence, or be included, for instance, in the 1855 Treaty when the division of Johore was settled. The inference therefore must be, that no transfer regarding Pulau Batu Puteh took place.

(v) Since the construction of the lighthouse and the continuous maintenance thereof, the Straits Settlements considered the feature (rock and building) as being under their jurisdiction. None of the various Johore Governments did at any time protest against this status. Based on the international principles of estoppel and historical consolidation, it must therefore have been considered to belong to Singapore[158].

(vi) *The Straits Settlements and Johore Territorial Waters (Agreement) Act* of 1928 only retroceded territory mentioned in the Crawfurd Treaty of 1824. It therefore does not apply to Pulau Batu Puteh.

(vii) In 1953, the Secretary of the Johore State Government issued a statement that it did not claim the feature. That this declaration was given "only" by the Acting State Secretary on the advice of the Regent - and not the Sultan (who was overseas at the time) - does not effect a legal invalidation of such assurance.

(viii) Malaysia's state practice up to the critical date does not give rise to the contention that it considered Pulau Batu Puteh to be part of its territory. This also impugns any possible Malaysian claims to further features in the vicinity such as Middle Rocks (1°19'.2 N, 104°24'.5 E) and/or South Ledge (1°18' N, 104°24' E).

According to the principles of historic consolidation and estoppel, Malaysia has no proof or foundation of any historical legal right to lay claim onto the rock. As adjudicated in the *Legal*

[158] Even if Malaysia were to produce a nineteenth century document suggesting, for instance, that the lighthouse was built with the permission of the Johore Sultan, therewith implying Johorian control over Pulau Batu Puteh at the time, such a deed would have lost its legal relevance due to the notion of historic consolidation.

Status of Eastern Greenland Case[159], the elements necessary to establish a valid title to sovereignty are the intention and will to exercise such sovereignty and the manifestation of state activity. Malaysia showed neither throughout the twenty-two years following its independence.

In 1974, i.e. five years after the *Emergency (Essential Powers) Ordinance* of 1969 which extended the territorial sea of Malaysia to 12 nm, the government published a map entitled *Pengerans* showing the southeastern section of Johore[160]. On this map, Pulau Batu Puteh is shown as Singaporean territory. It cannot be argued that this refers only to some residual administrative powers the republic may have held, *inter alia*, because Pulau Tekong Besar - an indisputably Singaporean island - is marked in an identical manner. This assumption can be supported by the fact that Pulau Pisang, on which the Straits Settlement also built a lighthouse[161] but whose sovereignty remained with Johore, is shown as Malaysian territory on a map published in the same year by the same authorities[162].

That Malaysia included the rock by unilateral action in 1979 into its territorial waters does not change established sovereignty. Singapore protested immediately against this inclusion (1980) and has continued to do so ever since. In a note (16/6/1989) to Wisma Putra, the Singapore High Commission in Kuala Lumpur expressed serious concern over the intrusion of a Malaysian police boat into Singapore's territorial waters. Singapore did not consider this action as an innocent or transit passage, and asked the Malaysian Government to prevent any reoccurrence. During a meeting, a month later, both Foreign Ministers agreed *"that the matter would be left to be resolved to the satisfaction of both parties"*[163]. During a further meeting between the then Singaporean Prime Minister Lee Kuan Yew and the Malaysian Prime Minister Mahathir in Brunei (3/8/1989), the former asked the latter not to send their military ships into the area, but gave permission for Malaysian fishermen to fish near Pulau Batu Puteh.

To the present, the dispute has not been resolved and the situation is still in flux[164]. Singapore is in possession of the rock, and is presently entitled to a 3 nm territorial sea around Pulau Batu Puteh, as it has not yet proclaimed an extension of its territorial waters to 12 nm[165] Such a new delimitation would overlap with Malaysian and also Indonesian maritime zones, and would therefore necessitate negotiations between the three countries. Should an agreement be reached on the equidistance principle, the delineation could be a median line taking the Rumenia Islands and Shoals into account for the Malaysian side, while on the Indonesian side BLC 194 (Tanjung Sading at 1°12'.3 N, 104°23'.5 E) and BLC 195 (Tanjung Berakit at 1°13'.8 N, 104°35'.6 E) would give effect to a new boundary.

159 PCIJ Series A/B, op.cit.:46 and 63

160 Siri L7010, Cetakan 5PPNM, Sheet 135, scale 1:63,360; Director of National Mapping

161 see the Indenture of 1900 by which the Straits Settlement Government was given the administrative rights for manning the lighthouse

162 see map titled *Pontian Kechil*, Siri L7010, Cetakan 6PPNM, Sheet 129, scale 1:63,360; Director of National Mapping

163 The Star 18/7/1989

164 certain incidents during the first half of 1992 have rather aggravated the issue: see e.g. the attempt by members of the youth movement of the Malaysian opposition party PAS (Parti Islam) to plant the Malaysian flag on the rock, and the forthcoming trial of seven Singaporean fishermen for allegedly intruding Malaysian waters near Pulau Batu Puteh, the outcome of which was not known at the point of writing

165 although according to a Government Press Release of 1980 (09-080/09/15) it expressed its intention to do so

Figure 1

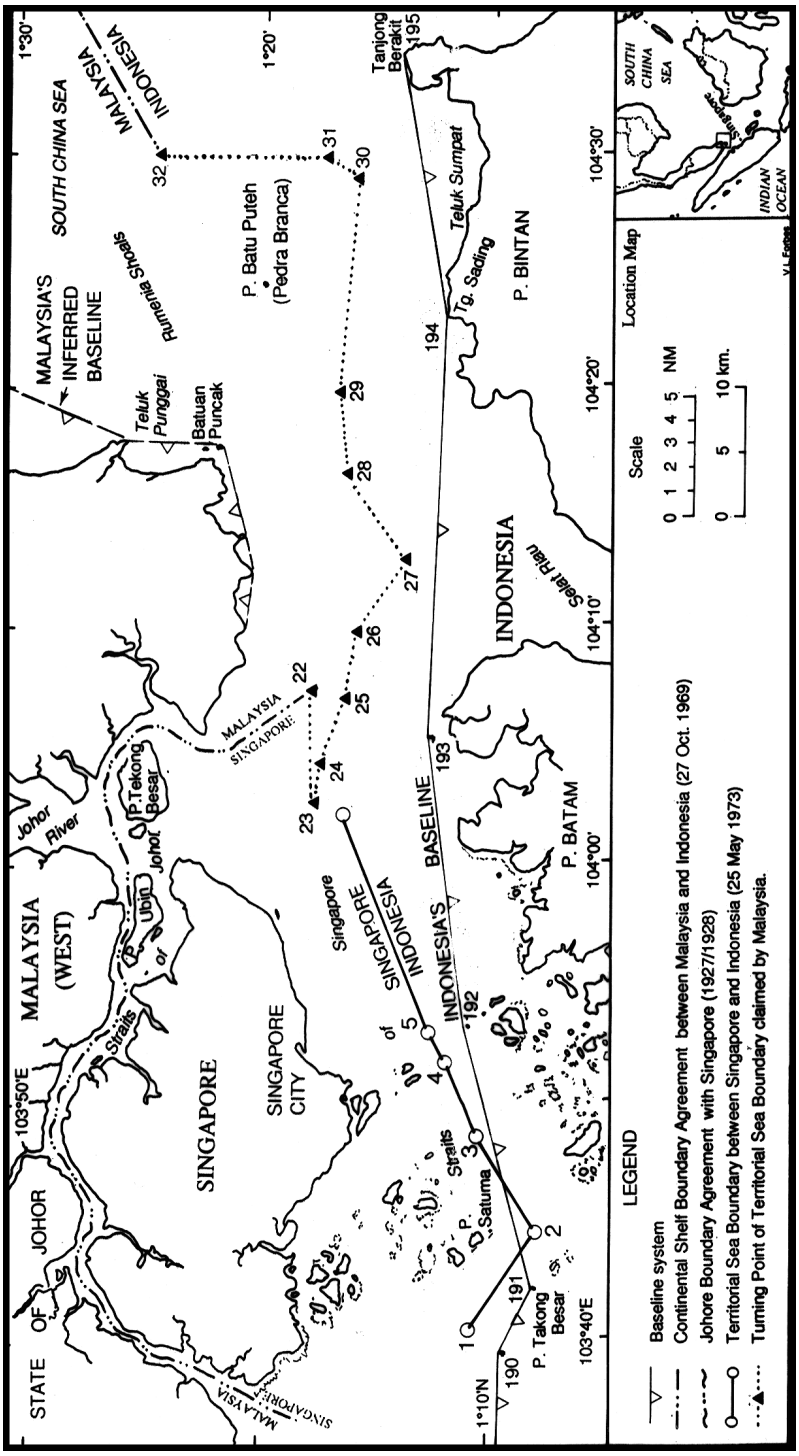

MALAYSIA'S INFERRED BASELINE
SOUTH CHINA SEA
MALAYSIA
INDONESIA
Pulau Batu Puteh (Pedra Branca)
Pulau Batu Puteh Shoals
Teluk Punggai
Batuan Puncak
Tanjong Berakit
Teluk Sumpat
Tg. Sading
P. BINTAN
INDONESIA
Selat Riau
P. BATAM
SINGAPORE
SINGAPORE CITY
MALAYSIA (WEST)
STATE OF JOHOR
Johor River
P. Tekong Besar
Johor or Ubin
Straits of Singapore
SINGAPORE INDONESIA BASELINE
INDONESIA'S BASELINE
P. Saturna
P. Takong Besar
MALAYSIA SINGAPORE
SINGAPORE MALAYSIA
103°50'E
103°40'E
1°30'
1°20'
1°10'N
104°30'
104°20'
104°10'
104°00'
Location Map
SOUTH CHINA SEA
INDIAN OCEAN
Scale
0 1 2 3 4 5 NM
0 5 10 km.
LEGEND
Baseline system
Continental Shelf Boundary Agreement between Malaysia and Indonesia (27 Oct. 1969)
Johore Boundary Agreement with Singapore (1927/1928)
Territorial Sea Boundary between Singapore and Indonesia (25 May 1973)
Turning Point of Territorial Sea Boundary claimed by Malaysia.

Figure 2

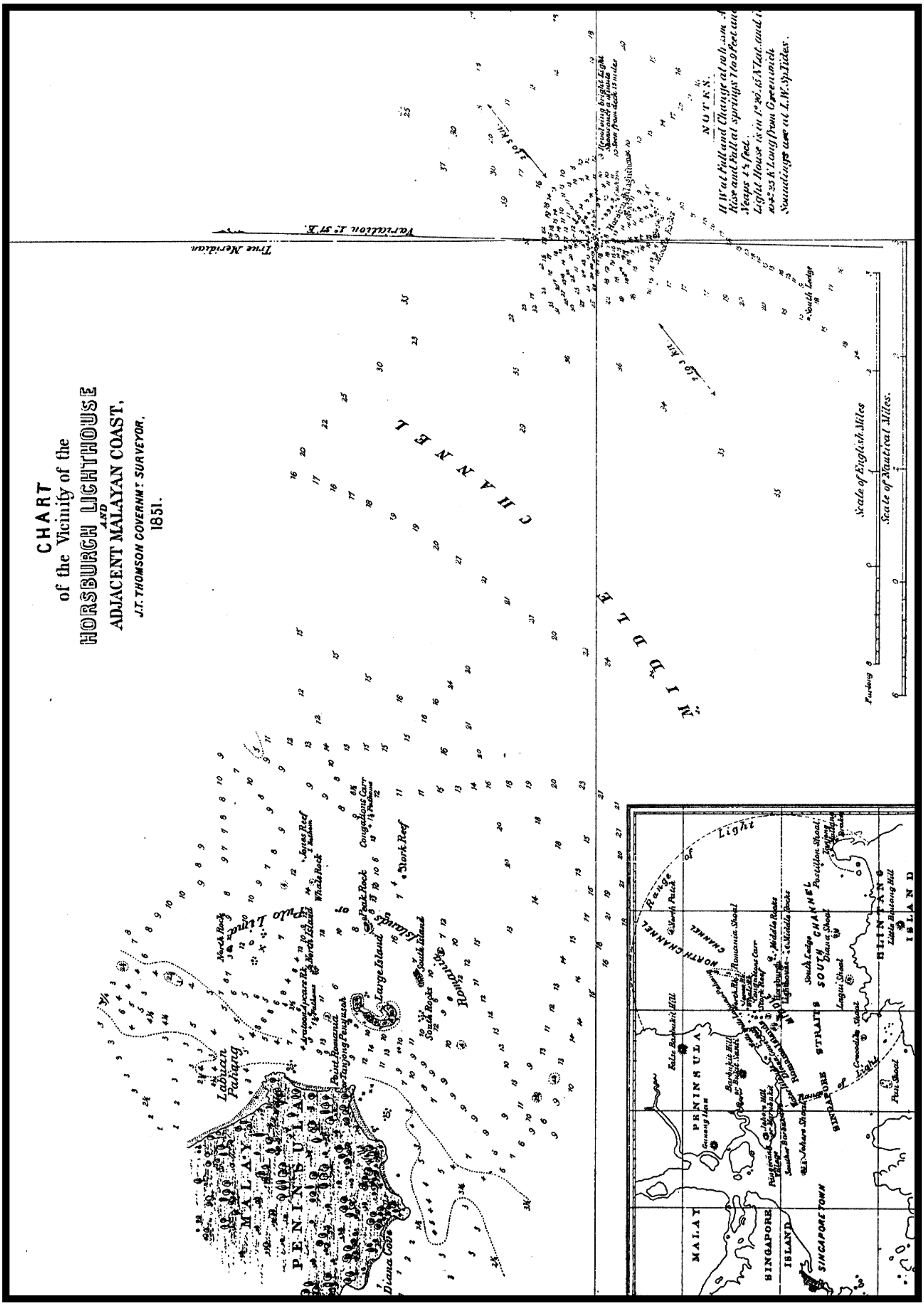
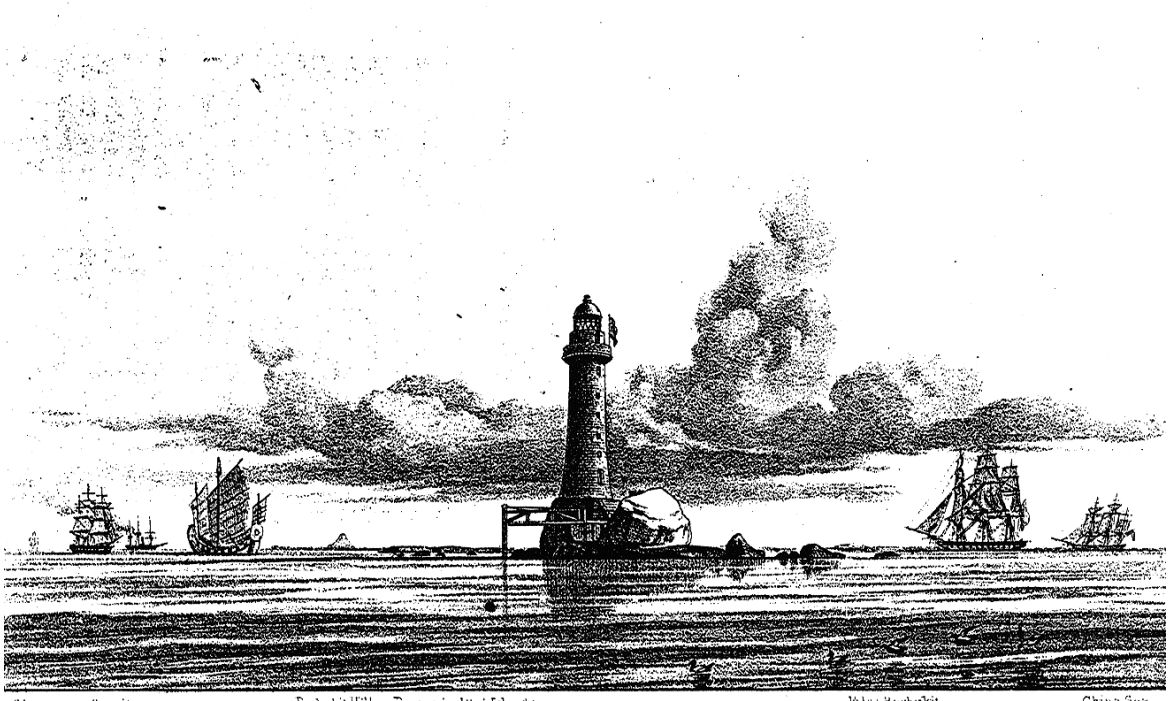


CHART
of the Vicinity of the
HORSBURGH LIGHTHOUSE
AND
ADJACENT MALAYAN COAST,
J.T. THOMSON GOVERNM.T SURVEYOR.
1851.
MIDDLE
CHANNEL
True Meridian
NOTES.
Scale of English Miles
Scale of Nautical Miles.
Large Island
South Island
Pulo Liman
Point Romania
Tanjong Penyusoh
Diana Cove
PENINSULA
MALAY
SINGAPORE
ISLAND
SINGAPORE TOWN
STRAITS
SOUTH CHANNEL
NORTH CHANNEL
BINTANG
ISLAND
Range of Light

Figure 3



HORSBURGH LIGHTHOUSE
October 1851

Abbreviations

AJIL	American Journal of International Law
ASEAN	Association of Southeast Asian Nations
BFSP	British and Foreign State Papers
BLC	base line coordinate
BYIL	British Yearbook of International Law
CO	Colonial Office
FEER	Far Eastern Economic Review, Hong Kong
FMS	Federated Malay States
FO	Foreign Office
HEIC	Honourable East India Company
ICJ	International Court of Justice
IMCO	Inter-Governmental Maritime Consultative Organisation
Ind.D.	Indian Decisions
Ind.L.R.	Indian Law Reports
IOL	India Office Library, London
JIA	Journal of the Indian Archipelago and Eastern Asia
JMBRAS	Journal of Malay(si)an Branch of the Royal Asiatic Society
Mal.L.R.	Malaya Law Review
nm	nautical miles
ODIL	Ocean Development and International Law
PCIJ	Permanent Court of International Justice
PRO	Public Record Office, London
RIAA	Reports of International Arbitral Awards
TP	turning points
UMS	Unfederated Malay States
UNCLOS III	Third UN Convention on the Law of the Sea, signed 1982 at Montego Bay
VOC	Dutch East India Company (Vereenigde Oostindische Compagnie)

Bilbliography

Aitchison, C.U. (1929) *Collection of Treaties, Engagements and Sanads Relating to India and the Neighbouring Countries*, Calcutta: Supt. of Government Printing.

Alexandrowicz, C.H. (1967) *An Introduction to the History of the Law of the Nation in the East Indies*, Oxford: Clarendon Press.

Allen, J. de V. Stockwell, A.J. and Wright, L.R.(ed.) (1981) *A Collection of Treaties and Other Documents Affecting the States of Malaysia*, 1761- 1963. (Vol.I/II), London: Ocean Publication Inc.

Braddell, R.St.J. (1915) [1982] *The Law of the Straits Settlements*, Kuala Lumpur: Oxford University Press.

Braddell, R.St.J. (1931) *The Legal Status of the Malay States*, Singapore: Malaya Publishing House Ltd.

Brown, C.C. (1970) *Sejarah Melayu*, (trs.), Kuala Lumpur: Oxford University Press.

Coulson, N. (1968) *Commercial Law in the Gulf States: The Islamic Legal Tradition*, London: Graham and Trotman.

Crawford, J. (1979) *The Creation of States in International Law*, Oxford: Clarendon Press.

Crawfurd, J. (1822) History of the Indian Archipelago, *Quarterly Review,* 28:111-138.

Crawfurd, J. (1856) [1971] *A Descriptive Dictionary of the Islands and Adjacent Countries* (Historical Reprints), Kuala Lumpur: Oxford University Press.

Far Eastern Economic Review, Hong Kong; various articles.

Fitzmaurice, G.G. (1954/1955-56) The Law and Procedure of the International Court of Justice,1951-54, Points of Substantive Law, Part I BYIL XXXI:371-429; Part II.BYIL XXXII:20-96.

Hooker, M.B. (1969) The East India Company and the Crown, Mal.L.R 11/1:1-35.

Hooker, M.B. (ed.) (1988) *The Laws of Southeast Asia*, (Vol.II) Singapore: Butterworth.

Ilbert, C. (1905) *The Government of India*, Oxford: Clarendon Press.

Jennings, R.Y. (1963) *The Acquisition of Territory in International Law*, Manchester: Manchester University Press.

Johnson, D.H.N. (1950) Acquisitive Prescription in International Law, BYIL XXVII:332-354.

Linehan, W. (1936) History of Pahang, JMBRAS XIV Part II: 1-257.

Logan, J.R. (ed.) (1858) The Sultan of Johore, JIA II:46-67.

MacGibbon, I.C. (1954) The Scope of Acquiescence in International Law, BYIL XXXI:143 186.

Maxwell, W.G. and Gibson, W.S. (1924) *Treaties and Engagements Affecting the Malay States and Borneo*, [London]: Published by Authority (printed by Jas Truscott & Son).

Mills, L.A. (1960) British Malaya 1824-1867, JMBRAS XXXIII Part 3.

Netscher, E. (1854) *Beschrijving van en gedeelte der Residentie Riau*, (in Bleeker, Munnich, Netscher 1854: Tijdschrift voor Indische Taal-Land- en Volkenkunde:108-270) Batavia: Lange & Co.

Newbold, C. (1839) [1971] *British Settlements in the Straits of Malacca*, (Vol.I/II, Historical Reprints) Kuala Lumpur: Oxford University Press.

O'Connell, D.P. (1955) *International Law in Australia*, Sydney: The Law Book Company Ltd.

O'Connell, D.P. (1967) *State Succession in Municipal and International Law*, (Vol.I/II) Cambridge: University Press.

O'Connell, D.P. (1982/1984) *International Law of the Sea*, (Vol.I/II). Oxford: Clarendon Press.

Oppenheim, L.F.L. (ed.) (1963) *International Law*, (Vol.I/II, 7th imp.) London: Longmans.

Raja Ali Haji ibn Ahmad, (1860) [1982] *Tuhfat al-Nafis*, (trs. B. Andaya and V. Matheson) Kuala Lumpur: Oxford University Press.

Rohis, W. (1989) Die Voraussetzungen der Clausula Rebus Sic Stantibus im Völkerrecht, PhD thesis, Universität Münster.

Rubin, A.P. (1974) *International Personality of the Malay Peninsula*, Kuala Lumpur: Penerbit Universiti Malaya.

Schwarzenberger, G. (1957) *International Law as Applied by International Courts and Tribunals*, (3rd ed. Vol.I) London: Stevens and Son Ltd.

Schwarzenberger, G. (1957) Title to Territory: Response to a Challenge, AJIL 51:308-324.

Stibbe, D.G. (1919) *Encyclopaedie van Nederlandsch-Indië,* s-Gravenhage: Martinus Nijhoff.

Straits Times, Singapore; various articles.

Symmons, C.R. (1979) *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff Publication.

The Star, Penang; various articles.

Thomson, J.T. (1852) Account of the Horsburgh Lighthouse, JIA VI:377-498.

Turnbull, C.M. (1972) *The Straits Settlements* 1826-1867, London: Athlone Press.

Verdoss, A. and Simma, B. (1984) *Universelles Völkerrecht,* (3. Auflage) Berlin: Duncker and Humblot Verlag.

Westlake, J. (1894) *Chapters on the Principles of International Law*, Cambridge: University Press.

Winstedt, R.O. (1932) The Bedaharas and Temenggongs, JMBRAS X Part l:55-66.

Winstedt, R.O. (1932) A Malay History of Riau and Johore, JMBRAS X Part 2:320-303.

Winstedt, R.O. (1932) A History of Johore 1365-1895, JMBRAS X Part 3:1-167.

India Office Library: material for the period 1826-1879, in particular:

(i) Bengal Public Consultations
P/14/1-23 (1850-1852)

(ii) Bengal Proceedings (Political and Secret)
L/P&S 5/19/19 (1861-1865)
L/P&S 5/127/46 (1837)
L/P&S 317/16 (1850-1852)

(iii) Bengal Proceedings (Public and Judicial)
L/P&J/3/296-318 (1858-1879)
L/P&J/3/1039 (1862)

(iv) Council of India
C7 (1861)

(v) Bengal Marine Proceedings
P/169/60-67 (1844) Superintendent of Marine Proceedings
P/172/25-69 (1844-1852) Marine Department Proceedings
P/172/53 (1849)
P/172/55-68 (1850)

(vi) Board's Collections
F/4/2120-2473 (1845-1852)

(vii) Records of the Legal Adviser's Department 1834-1859
L/L/6/3-4 (extracts) case nos. 701-801A
(1826-1862), 806-809, 811 (1858-1859)

(viii) Bengal Separate Consultations
P/165/23-39 (1848)

Colonial Office Records: This documentation dates from the period after the construction of the lighthouse.

(i) CO 273/142 (1886)

(ii) CO 273/150 (1887)

(iii) CO 273/319 (Straits Settlements Original Correspondence)

(iv) CO 273/407

(v) CO 426/1-15 (Register of Correspondence)

(vi) CO 882 (Confidential Print)
882/2 (1860-1872)
882/3 (1875-1876)
882/5 (1898)
882/8 (1906)

(vii) FO 93/46